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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

ROLANDO ARAUJO, JR.,

Petitioner,

v.

NEDRA CHANDLER, WARDEN

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Recently, in *Souter v. Jones*, 395 F.3d 577 (2005), the Sixth Circuit held that when a federal habeas petitioner shows actual innocence under the standard set forth in *Schlup v. Delo*, 513 U.S. 298 (1995), a court should address the merits of an untimely federal habeas petition for that reason alone. Other courts of appeals have held otherwise. In *Flanders v. Graves*, 299 F.2d 974 (8th Cir. 2002), the Eighth Circuit held that innocence may be relevant to overcoming a statute of limitations defense, but a petitioner must also show that some impediment prevented him from filing a timely innocence claim. In *Cousin v. Lensing*, 310 F.3d 843 (5th Cir. 2002), the Fifth Circuit simply rejected innocence as not relevant to the statute of limitations. *See also David v. Hall*, 395 F.3d 577 (1st Cir. 2003) (holding that prisoners "who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence is overwhelming.") After recognizing that this issue "has caused courts a good deal of consternation," the Seventh Circuit reaffirmed its view in the decision below that, in the Seventh Circuit, "actual innocence is not a freestanding exception to the statute."

The questions presented in this petition are:

1. Whether the statute of limitations governing federal habeas corpus petitions should be enforced against a petitioner who can demonstrate actual innocence?

2. Whether, to allow the petitioner to overcome a procedural default, a showing of actual innocence must be clear-cut and conclusively rule out the petitioner as a suspect.

PARTIES TO THE PROCEEDING

The parties are petitioner Rolando Araujo, Jr. and Nedra Chandler, the current Warden of the Dixon (Illinois) Correctional Center in Illinois. The parties appearing below were Araujo and Jerry L. Sternes, the Warden of Dixon (Illinois) Correctional Center at the time Araujo filed his petition for a writ of habeas corpus.

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Petitioner Rolando Araujo, Jr. respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The March 31, 1994 opinion of the Illinois Appellate Court affirming Araujo's conviction on direct appeal is reported at 261 Ill.App.3d 393. (Pet. App. 46a.) The July 23, 1997 judgment of the Circuit Court of Cook County denying Araujo's first post-conviction petition was given orally at the conclusion of an evidentiary hearing. (Pet. App. 42a.) The December 11, 1998 order of the Illinois Appellate Court affirming the denial of Araujo's first post-conviction petition is not reported. (Pet. App. 32a.) The September 15, 2000 order of the Circuit Court denying Araujo's second post-conviction petition is not reported. (Pet. App. 28a.) The September 27, 2002 opinion of the Illinois Appellate Court affirming the denial of Araujo's second postconviction petition is not reported. (Pet. App. 20a.) The Supreme Court of Illinois's February 5, 2003 decision denying Araujo's petition for leave to appeal is not reported. (Pet. App. 19a.)

The November 4, 2004 opinion and order of the United States District Court for the Northern District of Illinois denying Araujo's 28 U.S.C. § 2254 federal habeas corpus petition as untimely is unreported. (Pet. App. 10a.) The opinion of the United States Court of Appeals for the Seventh Circuit affirming the denial is reported at 435 F.3d 678 (7th Cir. 2005). (Pet. App. 1a).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on December 16, 2005. (Pet. App. 9a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 28 U.S.C. § 2244 and 28 U.S.C. § 2254. (Pet. App. 53a - 60a.)

In relevant part, 28 U.S.C. § 2244 provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim shall not be counted toward any period of limitation under this subsection.

In relevant part, 28 U.S.C. § 2254 provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. The Murder And Police Investigation.

Mario Rodriguez was shot and killed on the evening of August 23, 1988. Rodriguez had been loitering on the street with fellow members of the Bishops, a Chicago street gang. Around 6 o'clock, a maroon car drove up to the Bishops and two men got out. One of the men began to fire cover shots at the Bishops from a .25 caliber pistol while the second man approached Rodriguez, drew a .38 caliber revolver from the waistband of his pants, and fired at Rodriguez five times at close range. Rodriguez died on his way to the hospital.

The police interviewed several eyewitnesses at the scene. Four eyewitnesses – Gabriel Mujica, Ismael Martinez, Rigoberto Figuerroa, and David Chacon – were members of Rodriguez's gang. These four identified Araujo as the

principal shooter. (Ex. 2.)[1] They also described the car as a maroon Toyota they knew to be Araujo's. (*Id.*) The Bishops did not consistently identify the other shooter. Two of the Bishops identified him as "Wazz." (Ex. 3.) The others could not identify him.

Araujo was arrested at his home less than two hours after Rodriguez was shot. (Ex. 3, Tr. 403, 499-502.) Shortly after the arrest, the police obtained a warrant to search Araujo's home. (Ex. 4, Tr. 398-400, 507-10.) The police found a .38 caliber revolver underneath a mattress in the master bedroom. (Ex. 5, Tr. 509.) The gun was not loaded and police later determined that it had no fingerprints on it. (Tr. 545-46, 765.) The police sent the gun to the crime lab to be analyzed by a weapons expert. Chicago Police Sergeant Vincent Lomoro test-fired bullets from Araujo's gun and compared them under a forensic comparison microscope to the bullets recovered from Rodriguez's body. In his lab report, Sergeant Lomoro concluded that the two guns had the "same class characteristics." (Ex. 6.)

Chicago Police Officer John Delgado also was an eyewitness to the murder. (Ex. 8.) That evening, Officer Delgado was off-duty and in the neighborhood, returning rented videos to a store near his home. (*Id.*) At the scene, he told his fellow officers that he could identify the principal shooter as William Perez. Officer Delgado later identified Robert Mendoza from police photos as the cover man. Officer Delgado also stated that "he did not see Araujo at the time of the shooting," although he knew of him "slightly from the neighborhood" he patrolled, and therefore would have been able to identify him if he had seen him there. (*Id.*)

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[1] References to the exhibits to Araujo's federal habeas petition are denoted "Ex." References to the separate appendix to Araujo's brief in the Seventh Circuit are denoted "SA." References to the trial transcript are denoted "Tr."

Santiago Delgado also implicated Mendoza and Perez. (Ex. 8.) A day after the murder, Santiago Delgado was arrested for shooting another Bishop with a .25 caliber pistol. When questioned by the police, Delgado told them that Mendoza and Perez gave him the gun and told him they had just used it to shoot at the Bishops. (*Id.*)

Based on these statements from Santiago Delgado and Officer Delgado, the police arrested Mendoza. (Ex. 9.) They also brought Mendoza's then-girlfriend, 14-year old Zaida Cintron, to the police station for questioning. Both Mendoza and Cintron told the police that they were attacked by a group of Bishops, who threw bottles and bricks at them, at around 4 o'clock on the day of the murder. (*Id.*) They also told the police that the Bishops stole a chain from around Mendoza's neck. (*Id.*)

Cintron also told the police Mendoza confessed to her, on the night of the murder, that he shot Rodriguez. When Mendoza and Cintron met at a friend's house later on the night of the murder, Cintron

> noticed that Mendoza was acting very nervous and when she asked him what was wrong he would not tell her. She went on to state that at about 2400 hrs. she was still at that address and she and Mendoza were alone in a bedroom when Mendoza told her "We shot a Bishop." He went on to state that that he shot at the Bishop "five" times but did not know that he hit him with all those shots.

(Ex. 9.) Based on Cintron's statement, together with other evidence of Mendoza's guilt, four Chicago Police Officers who investigated Rodriguez's murder concluded that "Mr Mendoza armed with a hand gun shot Mr Rodriguez numerous times causing his death." (Ex. 10, 11.)

Although the police investigation did not uncover it, Mendoza also confessed to other friends on the night of the murder that he shot Rodriguez. At the same house where he confessed to Cintron, Mendoza told Hector Serrano and Santiago Delgado that he had shot Rodriguez in retaliation for what the Bishops had done to him earlier that day. (SA 185-87, 196-98.)

B. Trial Proceedings.

The State of Illinois charged Araujo with first degree murder and sought to prove at trial that Araujo fired the shots from the .38 caliber revolver that killed Rodriguez in violation of Illinois Revised Statutes Chapter 38, section 9-1(a)(1). The trial court rejected the State's accountability instruction. (Tr. 738.) Thus, the sole issue the jury had to decide was whether Araujo shot Rodriguez.

Four eyewitnesses testified at trial. Three of the four Bishops who made statements to police at the scene testified that Araujo shot Rodriguez. (Tr. 330-50, 432-50, 286-306.) The other Bishop, David Chacon, did not testify. (Tr. 574-76.) The fourth eyewitness, Officer Delgado, testified that he recognized the shooter as William Perez. (Tr. 588-98.) The four eyewitnesses all identified Mendoza as the cover man.

A private investigator, who had interviewed two of the Bishops, testified at trial that one of the testifying Bishops had admitted to him that he "didn't see the person who shot [Rodriguez]" and another admitted that he "knew that Rollie [Araujo] didn't do it," but that he told police that Araujo did so because he thought "Rollie was an asshole." (Tr. 662, 669.) In closing argument, the State apologized to the jurors for its eyewitnesses, pointing out that the State was "not asking [the jury] to like those admitted gang members," and that it was "[u]nfortunate" that its case involved such witnesses. (Tr. 759, 798.)

Anticipating the weakness of its eyewitness testimony, the State made clear in its opening statement that its "physical evidence" was the best evidence of Araujo's guilt and should convince the jury to convict him:

> Before you decide the guilt or innocence of anyone in this case, we're asking you to review the testimony that you hear from the stand. Then, we're asking you to look at the physical evidence in this case. We're asking you to look at the physical evidence to see which version corroborates what occurred out there on the street. Ladies and gentlemen, after you look at all the physical evidence and see how it corroborates what occurred out there in this senseless murder, we're asking you to find the defendant [Araujo] guilty of first degree murder.

(Tr. 267-68.) The only "physical evidence" admitted in evidence was Araujo's gun, which the State falsely claimed to be the murder weapon. (Tr. 303.)

In addition, the State's weapons expert, Chicago Police Sergeant Vincent Lomoro, told the jury that in his expert opinion the bullets that killed Rodriguez were consistent with having been fired from Araujo's gun, and that they had the "same class characteristics" as the bullets test-fired from Araujo's gun. (Tr. 482-84.) Sergeant Lomoro also testified that, although he could not be positive that it was the murder weapon, he could not exclude Araujo's gun from being the murder weapon. (Tr. 483.) Other police officers testified that Araujo's gun was not loaded and had no fingerprints on it at the time it was recovered; the State argued that this was proof that the gun had just been used in a crime. (Tr. 765, 801.) Cintron also testified that she saw Araujo shortly after the murder, and that he told her he was on his way to hide this evidence in his home. (Tr. 421.) In addition, two of the three testifying Bishops positively identified Araujo's gun as the

gun Araujo used to shoot Rodriguez. One identified it as "the gun the defendant had" and the other identified it as the gun he had seen before "in [Araujo's] hand." (Tr. 303, 347.)

This evidence allowed the State to argue that Araujo had shot Rodriguez with a gun he owned and that he fled the murder scene to hide the gun in his own home, but that he was arrested and the gun seized before he could get rid of it.

Both in its opening statement and in its closing argument, the State repeatedly implored the jurors who ultimately convicted Araujo to "look to the physical evidence" and to "make a decision based on [the] physical evidence." (Tr. 267-68, 758, 768.) The State also praised its police for the "good police work" which resulted in the recovery of this crucial physical evidence of Araujo's guilt. (Tr. 398-400, 507-10, 801.) In its last words to the jurors, the State again linked Araujo's gun to its theory of Araujo's guilt:

> Mr. Murphy [Araujo's trial counsel] is not a magician. ... He cannot wave a wand and make that gun go away, and he cannot wave a wand and bring back Mario Rodriguez. [Araujo] did this murder. Find him guilty for it.

(Tr. 812-13.) Araujo's trial counsel did not have the State's "physical evidence" independently analyzed to reveal the truth. Instead, in response to the State's gun evidence and assertions that it was the murder weapon, Araujo's counsel ultimately asked the jurors to ignore it altogether as "not an issue for your consideration." (Tr. 771.)

On April 26, 1991, the jury convicted Araujo. The trial judge sentenced him to 50 years. (Tr. 881.) Shortly after Araujo was convicted, Mendoza pled guilty to being an accomplice to the murder. In exchange for his guilty plea, Mendoza received a sentence of 25 years and is no longer in custody.

On direct appeal, Araujo argued among other things that there was "insufficient proof to connect the weapon to [the] defendant and the crime." (Pet. App. 49a.) The Appellate Court of Illinois disagreed and concluded that "there [was] ample evidence to connect defendant to the gun and the gun to the crime. Accordingly, we hold that the gun was relevant evidence and therefore, properly admitted." (Pet. App. 50a.) The Appellate Court affirmed Araujo's conviction.

C. State Post-Conviction Proceedings.

Araujo filed two post-conviction petitions in the Illinois state courts. On August 16, 1996, after diligently pursuing other evidence of his innocence, Araujo filed a motion to release the State's gun evidence so it could be independently analyzed. (Ex. 19.) The judge addressing the motion required that Araujo first file a post-conviction petition, which Araujo did on October 21, 1998. (Ex. 20, pp. 3-17.)

In his first petition, Araujo argued that he did not shoot Rodriguez, and that evidence demonstrating his innocence warranted a new trial. (Ex. 21.) Araujo's petition was based on affidavits from Mendoza and Cintron. In his affidavit, Mendoza confessed, as he had to several friends on the night of the murder, that he had shot Rodriguez. In her affidavit, Cintron recanted her trial testimony, in which she had claimed that shortly after the murder Araujo told her he needed to go home to hide his gun because he had just "done something."

On December 23, 1996, the judge turned over the State's gun evidence to Araujo for analysis. (Ex. 22.) In March 1997, Kenneth A. Siegesmund, Ph.D., an independent weapons expert, analyzed the State's evidence under a forensic comparison microscope. (Ex. 23.) Dr. Siegesmund concluded that Araujo's gun could not have fired the shots that killed Rodriguez. (*Id.*) His conclusion was based on the obvious differences in class characteristics between Araujo's gun and

the bullets recovered from Rodriguez's body. (*Id.*) The State also had the evidence re-analyzed (but not by Sergeant Lomoro, the State's expert witness at trial). Upon reviewing the same evidence Dr. Siegesmund analyzed, the State's new weapons expert, Walter Kryszak, agreed that Araujo's gun could not have been the murder weapon "based on a difference of class characteristics." (Ex. 24.)

The evidence these two experts analyzed was the same evidence that Sergeant Lomoro analyzed before he falsely testified (1) that Araujo's gun could not be excluded as the murder weapon, (2) that the tool mark patterns on the recovered bullets were "consistent" with having been fired from Araujo's gun, and (3) that Araujo's gun and the recovered bullets shared the "same class characteristics."

The post-conviction court held an evidentiary hearing on July 23, 1997. Mendoza and Cintron both testified. Mendoza testified that he shot and killed Rodriguez on August 23, 1988 and that Araujo did not. (Ex. 25, pp. 28-31.) Mendoza testified that he shot Rodriguez to retaliate against the Bishops for having attacked him and Cintron two hours before, using bottles and bricks and taking a chain from around his neck. Mendoza and Cintron had first recounted this attack in their statements to the police on August 29, 1988. (Ex. 9.) During Mendoza's testimony, the State threatened to charge him for both Rodriguez's murder and perjury. (Ex. 25, pp. 9-15.) Notwithstanding these threats, Mendoza testified that he was the one who shot Rodriguez.

Cintron testified that her trial testimony was false, and that she told the police this story to protect her boyfriend Mendoza by shifting the blame to Araujo. (Ex. 25, pp. 69, 72-73.)

At the hearing, the State stipulated that Araujo's gun was not the murder weapon. (Ex. 25, p. 15.) In light of this stipulated evidence, the post-conviction judge found as a

matter of fact that Araujo's gun was false evidence. (Pet. App. 44a.) There was no evidence offered to suggest that Sergeant Lomoro had been innocently mistaken about the gun evidence he analyzed.

Ultimately, however, the judge denied Araujo's petition. In his oral opinion, the judge stated that he did not find Mendoza and Cintron to be credible witnesses. The judge stated that he was not persuaded by Mendoza's testimony "not so much as for what he said, but for how he said it." (Pet. App. 42a.) He also stated that he would not have believed Mendoza "no matter what he testified to." (Pet. App. 43a.) The judge also disbelieved Cintron's post-conviction testimony, observing that it was difficult for him to decide which of her stories to believe, even though the State conceded that the police who searched Araujo's home within hours of the murder found no murder weapon there. (Pet. App. 43a-44a.)

In ruling on Araujo's petition, the post-conviction judge did not review the trial record, which Araujo's counsel pointed out at a hearing on a motion for reconsideration. (Ex. 26, pp. 6-7.) The judge also did not consider the host of evidence corroborating Mendoza's confession, including Mendoza's repeated earlier confessions to Cintron and other friends mere hours after he shot Rodriguez. The judge also did not consider the conclusions of four police officers that Mendoza shot Rodriguez. On December 11, 1998, the Illinois Appellate Court affirmed the denial of Araujo's petition. (Pet. App. 32a.)

Araujo filed a second state post-conviction petition on June 6, 2000. In his second petition, Araujo raised claims regarding the State's use of its false gun evidence at trial. (Ex. 31.) In this petition, Araujo argued that the State's knowing use of false evidence violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and that his trial

counsel's unreasonable failure to expose the truth about that evidence entitled him to a new trial under *Strickland v. Washington*, 466 U.S. 668 (1986). The post-conviction court denied Araujo's petition on the procedural ground that the Illinois Post-Conviction Act allows a petitioner to file only one post-conviction petition. 725 ILCS 5/122-1 *et seq*. The Illinois Appellate Court affirmed. (Pet. App. 20a.)

D. Federal Habeas Proceeding.

On January 20, 2004, Araujo filed a federal petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. In his petition, Araujo raised the *Brady* and *Strickland* claims he had raised in his second state post-conviction petition.

Attached to Araujo's petition was the declaration of Dr. Siegesmund, which explained in detail how Sergeant Lomoro knew or should have known that the State's gun evidence was false. Dr. Siegesmund explained that the differences between the bullets that Sergeant Lomoro analyzed (bullets recovered from Rodriguez's body and bullets test-fired from Araujo's gun) were obvious under a forensic comparison microscope, that Sergeant Lomoro would have seen and appreciated these differences, and that he therefore should have excluded Araujo's gun as the murder weapon. Dr. Siegesmund also explained that Sergeant Lomoro's own testimony confirmed that he must have known that Araujo's gun was not the murder weapon, given the following:

(1) Sergeant Lomoro testified that he attempted to find matching individual characteristics on the bullets (tiny striation patterns particular to an individual weapon),

(2) this required that he first attempt to line up the more obvious land marks on the bullets (larger marks on

the bullets where the individual characteristics appear),

(3) the land marks did not match between the bullets, which Sergeant Lomoro would have realized when he tried to find matching individual characteristics, and

(4) the difference between the land marks meant that Araujo's gun did not have the same class characteristics as the murder weapon and was therefore false evidence.

Dr. Siegesmund further explained that Sergeant Lomoro's trial testimony – that Araujo's gun had the "same class characteristics" as the gun that killed Rodriguez, and that he therefore could not exclude Araujo's gun as the murder weapon – was clearly false.

On March 12, 2004, respondent filed a motion to dismiss Araujo's petition as untimely under §2244(d). Araujo responded to the motion by arguing that the compelling evidence, both of his innocence and of Mendoza's guilt, should allow the court to address his constitutional claims under the fundamental miscarriage of justice exception recognized by this Court in *Schlup v. Delo*, 513 U.S. 298 (1995).

In addition to the uncontroverted expert declaration of Dr. Siegesmund, that the State knowingly relied on false physical evidence to convict Araujo, Araujo submitted numerous affidavits which corroborated Araujo's version of the facts and either exonerated Araujo or inculpated Mendoza. Araujo's evidence included the following:

- as a matter of stipulated fact, the gun presented as the murder weapon at Araujo's trial was false evidence;

- the State's weapons expert, Sergeant Lomoro, could not have been mistaken about the gun evidence and necessarily lied about it to obtain Araujo's conviction (Siegesmund declaration, SA 173-180.);
- two of the State's eyewitnesses falsely identified Araujo's gun as the murder weapon;
- Zaida Cintron recanted her false testimony regarding Araujo's plan to hide the murder weapon in his home (Cintron post-conviction testimony);
- Mendoza confessed to Santiago Delgado less than an hour after he murdered Rodriguez and also gave Delgado the .38 caliber revolver he had used to shoot Rodriguez to hide it from the police (Delgado affidavit, SA 185-187.);
- Mendoza confessed to Hector Serrano less than an hour after Mendoza murdered Rodriguez (Serrano affidavit, SA 196-197.);
- Mendoza confessed to his girlfriend, Zaida Cintron, the same day he murdered Rodriguez, a fact reflected in an August 28, 1988 police report (Ex. 9.);
- Maria Rincon overheard Mendoza's confession to Cintron on the day Rodriguez was murdered (Rincon affidavit, SA 202-203.);
- four Chicago Police Officers who investigated Rodriguez's murder concluded affirmatively that "Mr Mendoza armed with a hand gun shot Mr Rodriguez numerous times causing his death" (Ex. 10, 11.);
- Mendoza himself confessed, in court and under threat of perjury and trial for his true role in the

murder, that he shot Rodriguez (Mendoza post-conviction testimony);

- Officer John Delgado, another eyewitness, did not see Araujo at the time of the murder (Rea affidavit, SA 211-215.); and
- David Chacon, the Bishop who witnessed Rodriguez's murder but did not testify against Araujo at trial, confessed that he and the other Bishop eyewitnesses falsely implicated Araujo as the shooter, even though they knew he did not (Chacon affidavit, SA 208-209);
- Gabriel Mujica, one of three Bishops who identified Araujo as the shooter at trial, admitted that he and several other Bishops were responsible for Rodriguez's death because they beat up Mendoza only hours earlier; Mujica told a superior in his gang, Theodore Torres, that he saw Mendoza shoot Rodriguez but blamed Araujo so that he would not get in trouble with the members of his gang (Torres affidavit, SA 219-221.).

On November 4, 2004, the district court dismissed Araujo's petition as untimely. (Pet. App. 10a.) The district court did not hold an evidentiary hearing or otherwise consider the new evidence of Araujo's innocence.

E. The Decision Below.

On appeal, Araujo again argued that the district court should have addressed the merits of his untimely petition because he satisfied the "actual innocence" standard of the fundamental miscarriage of justice exception set forth in *Schlup*.

The Seventh Circuit affirmed the district court's denial of Araujo's petition. (Pet. App. 1a.) The court reasoned that,

because Araujo did not bring his innocence claim in time to satisfy the requirements of section 2244(d)(1)(D), his argument was necessarily that actual innocence is a "freestanding exception to the statute." (Pet. App. 5a.) The court then rejected this argument, observing that "it is clear that in this circuit, actual innocence is not a freestanding exception to the statute." (Pet. App. 8a.)

The Seventh Circuit also "briefly" addressed the evidence of Araujo's innocence, which it found to be "subject to interpretation" and "not clear-cut" in that "[i]t was not DNA evidence conclusively ruling him out as the perpetrator, for instance." (Pet. App. 6a-8a.) Specifically, the court noted that the post-conviction court found Mendoza and Cintron's post-conviction testimony to be not credible, that Officer Delgado's testimony was not new evidence, and that the State's expert trial witness did not offer conclusive testimony regarding Araujo's gun. The court also concluded that Araujo's allegation that the Bishops testified falsely "lacks support." (Pet. App. 7a.)

In assessing Araujo's evidence, the court did not mention or cite to the standard of actual innocence set forth in *Schlup*. The court also failed to "fairly consider all of the evidence presented," as *Schlup* requires, ignoring the host of evidence corroborating Mendoza's confession and guilt. *Schlup*, 513 U.S. at 329.

REASONS FOR GRANTING THE WRIT

I. There Is A Conflict In The Circuits As To Whether A Court Should Address The Merits Of An Untimely Habeas Petition When The Petition Establishes A Credible Claim Of Actual Innocence.

The Antiterrorism and Effective Death Penalty Act, which governs federal habeas corpus petitions, became effective on April 24, 1996. 28 U.S.C. §§ 2241-2255, 2261-

2266. The AEDPA includes a statute of limitations provision at section 2244(d), which is the first such provision in the history of the federal writ of habeas corpus. Section 2244(d) provides that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court," and that this "limitation period shall run from the latest of" four specified dates. 28 U.S.C. §2244(d)(1).

Section 2244(d) does not explicitly provide an exception for innocent petitioners; nor does it expressly preclude one. Courts have consistently held that compliance with this provision is not a jurisdictional requirement. *See, e.g., Davis v. Johnson* , 158 F.3d 806, 810-12 (5th Cir. 1998), *Taliana v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999). Further, courts have recognized that noncompliance with section 2244(d) may be excused in certain circumstances under the judicial doctrine of "equitable tolling," which provides an exception when the petitioner's untimeliness is attributable to factors beyond his control. *See Williams v. Sims*, 390 F.3d 958, 962 (7th Cir. 2002) ("it is not surprising that all the cases that address whether the common law tolling doctrines are applicable to the habeas corpus statute of limitations have held that they are") (collecting cases); *see also Pace v. Diguglielmo*, 125 S.Ct. 1807, 1815 (2005) (assuming *arguendo* that equitable tolling applies to section 2244(d)). These holdings are consistent with the fact that section 2244(d) does not explicitly direct a federal court to dismiss an untimely petition, unlike other provisions of the AEDPA. *Compare* 28 U.S.C. § 2244(d)(1) with § 2244(b)(1) (noncompliant petition "shall be dismissed") and § 2244(b)(4) ("district court shall dismiss" noncompliant petition). In other words, section 2244(d) is not an inflexible bar to habeas relief.

Actual innocence should be a freestanding exception to § 2244(d) under the fundamental miscarriage of justice doctrine, recognized by this Court in *Schlup* and in earlier cases. This doctrine allows a habeas petitioner to overcome a procedural default and have the merits of his petition addressed when he can demonstrate actual innocence. Providing an exception to procedural default for innocent petitioners reflects that habeas corpus is an equitable remedy, concerned at its core with the interests of justice. *Schlup*, 513 U.S. at 321-322. This principle is codified in the habeas statute at Section 2243, which provides that a federal habeas court "shall ... dispose of the matter as law and justice require." 28 U.S.C. §2243.

In the ten years since the AEDPA became effective, federal courts have struggled with the question whether the fundamental miscarriage of justice exception recognized in *Schlup* applies to the statute of limitations, just as it does to other forms of procedural default in the habeas context. In the decision below, the Seventh Circuit recognized that this issue "has caused courts a good deal of consternation." (Pet. App. 5a.) This consternation has led to a clear and decisive split among the courts of appeals. Specifically, various courts of appeals have adopted one of three alternatives with respect to this important question: (1) some courts have held that to overcome the statute of limitations a petitioner must not only show that he is innocent, but also that some impediment prevented him from presenting his innocence claim on time, (2) one court has held that innocence is itself an exception to the statute of limitations, regardless of the timing of the petition, and (3) two other courts have held that innocence is not an exception to the statute.

Without guidance from this Court, the courts of appeals will remain divided on this important issue. The Court should grant the petition to ensure that the fundamental miscarriage

of justice exception of *Schlup* is applied uniformly to section 2244(d), regardless where a petition is filed.

A. The Courts Of Appeals Are Clearly Divided On An Important Issue Of Federal Law.

In *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002), the Eighth Circuit held that actual innocence, without more, is not an exception to the statute of limitations. The *Flanders* court rejected the argument that the fundamental miscarriage of justice exception of *Schlup* applies to section 2244(d), reasoning that:

> We are dealing here with a statute. It is our duty to apply statutes as written. The statute fixes a one-year period of limitations, and says nothing about actual innocence ... . It is not our place to engraft an additional judge-made exception onto congressional language that is clear on its face.

The Eighth Circuit then observed that the judge-made doctrine of equitable tolling applied to section 2244(d), but determined that actual innocence was not a traditional equitable tolling circumstance, since innocence was not an excuse accounting for a petitioner's failure to file on time. *Id.* Ultimately, the Eighth Circuit held that innocence can be relevant to an equitable tolling argument, provided the petitioner can offer such an excuse for his failure to file his innocence claim on time. Specifically, the Eighth Circuit observed that:

> We do not hold that actual innocence can never be relevant to a claim that the habeas statute of limitations should be equitably tolled. For such an exception to be viable, though, a petitioner would have to show some action or inaction on the part of the respondent that prevented him from discovering the relevant facts in a timely fashion, or, at the very

> least, that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations.

Id. at 978. In other words, the Eighth Circuit's approach conflates the fundamental miscarriage of justice doctrine and the doctrine of equitable tolling. Because the petitioner in *Flanders* offered no equitable tolling excuse, the court affirmed the dismissal of his petition without considering his innocence argument.

The Seventh Circuit has previously adopted the approach outlined in *Flanders*, and reaffirmed that holding in the decision below. *Gildon v. Bowen*, 384 F.3d 883, 887 (7th Cir. 2004) ("We find the Eighth Circuit's analysis of this issue in *Flanders v. Graves*, to be persuasive."). *See also Balsewicz v. Kingston*, 425 F.3d 1029, 1033 (7th Cir. 2005) (noting that under *Gildon* "actual innocence, instead of comprising a freestanding exception to the AEDPA, must be presented in conjunction with a claim that the habeas statute of limitations should be equitably tolled"); *Escamilla v. Jungwirth*, 426 F.3d 868, 872 (7th Cir. 2005) ("Actual innocence without a newly discovered claim does nothing at all."). In the decision below, the Seventh Circuit also noted that "actual innocence is not a freestanding exception to the statute." (Pet. App. 8a.)

While the Seventh Circuit has adopted the approach of *Flanders*, the Sixth Circuit has expressly rejected it. *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005); *id.* at 601 n.16 ("We decline to adopt the approach outlined by the Eighth Circuit in *Flanders*.") The petitioner in *Souter* had demonstrated his innocence under the *Schlup* standard and, for that reason alone, the Sixth Circuit remanded the case to the district court to consider the merits of his constitutional claims. The Sixth Circuit specifically rejected the additional equitable tolling requirements of the Eighth Circuit's approach because those requirements are inconsistent with this Court's

jurisprudence regarding the fundamental miscarriage of justice exception. *Id.* ("we decline to impose additional requirements upon a petitioner beyond those which the Supreme Court has set forth in its habeas corpus jurisprudence"). The Sixth Circuit, in other words, held that actual innocence is an exception to the statute of limitations under the fundamental miscarriage of justice doctrine of *Schlup*, and this exception does not require an innocent petitioner also to provide an equitable tolling or other excuse for his failure to file on time.[2]

The Sixth Circuit applied this exception to section 2244(d) as a background principle of habeas jurisprudence, recognized by this Court in *Schlup* and earlier cases, against which Congress drafted the AEDPA. Thus, in sharp contrast to the reasoning of the Seventh and Eighth Circuits, the Sixth Circuit held that Congress's silence in section 2244(d) regarding actual innocence reflects its intent to allow for the fundamental miscarriage of justice exception, not to preclude it.

Still other circuits hold that a petitioner's actual innocence is not relevant to the statute of limitations. In *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002), the petitioner filed his petition beyond the period provided in section 2244(d) but also alleged that he was innocent. The district court did not address the merits of his innocence claim. On appeal, the Fifth Circuit held that this was proper because actual innocence did not "justify equitable tolling of the limitations period." *Id.* (citing *Felder v. Johnson*, 204

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[2] District courts in other circuits have reached the same conclusion as the Sixth Circuit that the fundamental miscarriage of justice exception of *Schlup* applies to section 2244(d). The most thoughtful analysis of this issue is presented in *United States v. Zuno-Arce*, 25 F.Supp.2d 1087, 1099-1102 (C.D.Cal. 1998) and *Alexander v. Keane*, 991 F.Supp. 329 (S.D.N.Y. 1998).

F.3d 168, 171 (5th Cir. 2000)). The First Circuit also follows this approach. *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003) ("the statutory limit on filing initial habeas petitions is not mitigated by any statutory exception for actual innocence"); *id.* at 347 (habeas petitioners "who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence is overwhelming"). Unlike the approach in the Seventh and Eighth Circuit, which allow actual innocence to equitably toll the statute of limitations in certain circumstances, these courts preclude reliance on an innocence exception altogether.

B. This Court Should Clarify That The Fundamental Miscarriage Of Justice Exception Applies To The Statute of Limitations.

As the above makes clear, the Circuits have drawn contradictory conclusions from Congress's silence in section 2244(d) regarding actual innocence.

This Court should resolve this clear conflict and hold that the fundamental miscarriage of justice exception applies to section 2244(d). In the habeas context there is a well-established give and take between Congress and this Court. The question presented in this petition calls on this Court once again to strike an appropriate balance between the objectives reflected in the habeas statute and the objectives of fundamental justice. *See, e.g., Schlup*, 513 U.S. at 319, fn. 35 (this Court has "repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence").[3]

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[3] *See also Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) (rules governing habeas corpus reflect a "balancing of objectives (sometimes controversial), which is normally for Congress to make, but which courts

There is no reason that the exception should not apply to § 2244(d) just as it does to other forms of procedural default in the habeas context. As this Court recognized in *Calderon v. Thompson*, 523 U.S. 538, 558 (1998), the fundamental miscarriage of justice exception is "altogether consistent" with the AEDPA. Contrary to the reasoning of the Eighth Circuit in *Flanders*, the mere fact that section 2244(d) does not provide for an innocence exception does not mean the fundamental miscarriage of justice exception cannot apply. In *Kuhlman v. Wilson*, 477 U.S. 436, 452 (1986), this Court applied an actual innocence exception to the successive writ provision of the federal habeas statute, 28 U.S.C. § 2244(b), even though such an exception was not expressly included in that provision. This Court also applied the exception to the successive writ provisions of the statute in *Schlup*.

This Court should also clarify that the equitable tolling requirements of the Seventh and Eighth Circuit approach are unwarranted additional requirements that contradict this Court's precedent. In *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986), this Court defined the fundamental miscarriage of justice exception as necessarily independent of any excuse a petitioner might otherwise need to offer to overcome a procedural default. In *Schlup*, this Court recognized that the exception requires an assessment of the totality of the evidence (including evidence that was available but not presented at trial), not just evidence that the petitioner could

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will make when Congress has not resolved the question"); *Brecht v. Abrahamson*, 507 U.S. 619, 632-33 (1993) ("As a general matter, we are 'reluctant to draw inferences from Congress' failure to act' ... We have filled the gaps of the habeas corpus statute with respect to other matters, and find it necessary to do so here.") (citations omitted); *Wainwright v. Sykes*, 433 U.S. 77, 81 (1977) (noting the "Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged").

not have discovered and presented earlier. *Id.* at 329 (requiring that the court must "fairly consider all of the evidence presented" from a reasonable juror's perspective). This Court should once again clarify that, in applying the fundamental miscarriage of justice exception, the only salient fact is the fact of the petitioner's innocence.

II. The Courts Of Appeals Require Guidance On How To Apply *Schlup* In Cases Like Araujo's Where Evidence Presented At Trial Was Either False Or Inconclusive And Evidence Not Presented At Trial Strongly Implicates Another Suspect.

The second question presented in this petition is substantially the same as one of the two questions presented in *House v. Bell*, No. 04-8990, pet. for cert. granted, June 28, 2005, which asks that the Court clarify the *Schlup* actual innocence standard.[4] By granting review in *House*, this Court has decided that application of the *Schlup* standard is an important issue in federal habeas jurisprudence, and that the lower courts require further guidance from this Court in this respect.

The petitioner in *House* showed that the lower courts require guidance in applying *Schlup* in the following

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[4] The questions presented in that petition were:

1. Did the majority below err in applying this Court's decision in *Schlup v. Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial?

2. What constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?

respects: (1) evaluating the impact that new evidence has on the State's proof at trial, (2) evaluating the evidence from the perspective of a reasonable juror, and (3) requiring or not requiring an affirmative showing of innocence. Pet. No. 04-8990 at 15-28. Araujo's case would allow this Court to provide further guidance to the lower courts in the context of applying the fundamental miscarriage of justice exception to section 2244(d).

The Seventh Circuit in this case misapplied the *Schlup* standard in much the same way that the lower court did in *House*. Like the petitioner in *House*, Araujo presented evidence of innocence that demonstrated the falsity of the State's physical evidence – which not only had been the centerpiece of the State's case at trial, but was used by the State to lend credibility to its occurrence witnesses, whose unreliability was so obvious that the State apologized to the jury for calling them. The now-uncontroverted fact that Araujo's gun could not possibly have fired the bullets that killed Rodriguez establishes that both the State's trial expert and at least two of its eyewitnesses lied on the witness stand. It also completely undermines the State's theory of the case and its reliance on the gun evidence, which the State repeatedly implored the jury to find dispositive as to Araujo's guilt. These new facts regarding the trial evidence would have had a powerful effect on a reasonable juror, a factor the Seventh Circuit declined to consider.

The Seventh Circuit also failed to consider the reasonable juror perspective in evaluating the evidence of Mendoza's guilt. No reasonable juror could have overlooked Mendoza's motive for revenge or the fact that Mendoza repeatedly confessed to having shot Rodriguez – first to his friends and girlfriend on the night of the murder, and finally under oath in open court, where he was reminded by the prosecution that he could still be prosecuted for murder. In other words, no

reasonable juror could have found Araujo guilty beyond a reasonable doubt. Indeed, the fact that four police officers affirmatively concluded that Mendoza was the shooter is compelling evidence that a juror would have concluded the same and would not have voted to convict Araujo. *Kyles v. Whitley*, 514 U.S. 419, 448 (1995) (considering evidence regarding the conclusions of the police to evaluate the impact of *Brady* evidence on a juror and noting that "If a police officer thought so, a juror would have, too.")

The Seventh Circuit purported to find some support in the record to support the theory of Araujo's guilt, but it failed to consider all of the evidence of Araujo's innocence, which a reasonable juror would not do. *Schlup*, 513 U.S. at 328.

Finally, the Seventh Circuit seemingly believed that Araujo was required to establish his innocence by presenting evidence that was "clear-cut" and that would "conclusively" rule him out as a suspect. Apparently, the Seventh Circuit believed that only "irrefutable" evidence, such as DNA evidence, could satisfy this test. While Araujo believes that his evidence strongly demonstrates that Rodriguez was shot by Mendoza – and not by Araujo – there is no such requirement in *Schlup*. All that *Schlup* requires is that the evidence would more likely than not lead a reasonable juror to conclude that Araujo was not guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 327, 329. As the petitioner in *House* pointed out, however, the courts of appeals have interpreted *Schlup* in radically different ways, and the question whether *Schlup* requires an affirmative showing of innocence is an important question warranting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

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March 15, 2006

APPENDIX

Appendix A

United States Court of Appeals,
Seventh Circuit

ROLANDO ARAUJO, JR., Petitioner-Appellant,

v.

NEDRA CHANDLER, Respondent-Appellee.

No. 05-1174.

ARGUED NOVEMBER 8, 2005
DECIDED DECEMBER 16, 2005

OPINION

Before EVANS, MANION, BAUER

EVANS, *Circuit Judge.*

In 1991, a jury sitting in the Circuit Court of Cook County convicted Rolando Araujo of the 1988 murder of Mario Rodriguez. On January 20, 2004, Araujo petitioned for the first time for the issuance of a writ of habeas corpus, pursuant to 28 U.S.C. § 2254.[1] Given the dates we just set out, it is not surprising that the primary issue before us in this appeal from the district court's denial of his petition is whether the one-year statute of limitations in the

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[1] Araujo's current custodian is Nedra Chandler, the warden of the Dixon Correctional Center. We therefore substitute Chandler as the respondent-appellee in this case. 28 U.S.C. § 2254, Rule 2(a); Fed. R.App. P. 43; *see also Bridges v. Chambers,* 425 F.3d 1048 (7th Cir.2005).

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d), bars relief.

The facts established at trial, as recited by the Illinois Appellate Court on direct appeal, show that the shooting happened as members of a street gang, the Bishops, and the victim, Mario Rodriguez, were walking near Harris Park in Chicago. Araujo, a member of the rival Ambrose street gang, drove past them, stopped his car, jumped out, and shot Rodriguez. At the same time, Robert Mendoza, another Ambrose street gang member, was shooting a gun in the direction of other Bishops. Both Mendoza and Araujo were charged. Mendoza entered a plea of guilty to the first degree murder of Rodriguez based on his role as a lookout. Araujo went to trial and was convicted. In addition to his direct appeal, Araujo has, over the years, filed two petitions for postconviction relief in the Illinois courts. His claims have been rejected each time.

AEDPA contains a one-year statute of limitations, set out in 28 U.S.C. § 2244(d). But because Araujo's conviction was final prior to the effective date of the statute, that is, before April 24, 1996, he is subject to the one-year grace period for timely petitions for review in federal court. *See Lindh v. Murphy*, 96 F.3d 856 (7th Cir.1996), *rev'd on other grounds*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Had his petition been filed by April 24, 1997, it would have been timely. In addition, under § 2244(d)(2), the time during which his state postconviction litigation was pending would have tolled the running of the statute. However, these time periods are not sufficient to bring him within the statute of limitations, and Araujo does not seriously argue that they are.

What he does argue is that he is actually innocent and

that therefore the application of the statute of limitations in § 2244(d) to bar his petition would result in a fundamental miscarriage of justice. He urges us to determine that a freestanding "actual innocence" exception must be read into the statute. The exception would not require a showing that a petitioner exercised due diligence in discovering his claim. It would be "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins,* 506 U.S. 390, 404, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

Unfortunately for him, the argument comes too late. We have recently decided that "[p]risoners claiming to be innocent, like those contending that other events spoil the conviction, must meet the statutory requirement of timely action." *Escamilla v. Jungwirth,* 426 F.3d 868 (7th Cir.2005).

In an ordinary case, the one-year statute of limitations in § 2244(d)(1) runs from the latest of four possible dates:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the

> claim or claims presented could have been discovered through the exercise of due diligence.

In addition, we have recognized that in some situations the statute might be subject to equitable tolling. In *Gildon v. Bowen,* 384 F.3d 883, 887 (7th Cir.2004), we said that "[e]quitable tolling is proper when extraordinary circumstances outside of the petitioner's control prevent timely filing of the habeas petition." In that case, the circumstance--which ultimately failed to carry the day--was that the corrections officers did not deliver petitioner's mail on time. We also have recognized that equitable estoppel may apply to § 2244 but, as with equitable tolling, "only where the doctrine's operation would not conflict with the tolling provisions specifically listed in § 2244(d)." *Balsewicz v. Kingston,* 425 F.3d 1029 (7th Cir.2005). We rejected the argument that the language of the Wisconsin postconviction statute misled Balsewicz into believing that he could file his state postconviction challenge at any time and still obtain federal habeas review.

The assumption underlying Araujo's appeal is that his petition does not comfortably fall within any of the statutory or equitable principles. Were the petition to be forced into one of the existing exceptions, the parties do not agree on which one would be appropriate. The State contends that Araujo's "actual innocence" claim must "by default ... fall within the equitable tolling camp." Araujo disagrees and argues, somewhat halfheartedly, that if actual innocence is not a freestanding exception, his case would most closely fall within the statutory provision in § 2244(d)(1)(D)--he must file within one year of the date on which the facts on which his claim is based could have been discovered "through the exercise of due diligence."

We agree with the latter contention that § 2244(d)(1)(D) would be the provision to which we should look, but we cannot find that Araujo meets the requirements of that provision. The Illinois state trial court was considering Araujo's claims of innocence at a hearing in 1994. He has not exercised due diligence in bringing to the federal courts the facts which he claims show he is innocent. That failing means that we are left with his contention that actual innocence is a freestanding exception to the statute.

It is an argument which has caused courts a good deal of consternation. The Court of Appeals for the Eighth Circuit has determined that actual innocence is relevant to a claim that the statute of limitations should be tolled, but the petitioner must still make a showing of reasonable diligence in discovering the facts underlying his claim. *Flanders v. Graves,* 299 F.3d 974 (2002). In contrast, recently in *Souter v. Jones,* 395 F.3d 577 (2005), the Court of Appeals for the Sixth Circuit has found that, if a petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him guilty, he should be allowed to pass through the "gateway" (provided by actual innocence) and argue the merits of his underlying constitutional claims. Other courts of appeals have avoided deciding the timeliness issue by first requiring that the district court determine whether there is, in fact, a showing of actual innocence. *See Whitley v. Senkowski,* 317 F.3d 223 (2nd Cir.2003); *Majoy v. Roe,* 296 F.3d 770 (9th Cir.2002).

However, in this circuit, it seems clear that Araujo's argument cannot survive *Escamilla. Escamilla* also was a case subject to § 2244(d)(1)(D), and it also was a case, like this one as we shall see in a moment, where the support for the claim of actual innocence involved facts which were

subject to interpretation--that is, the claim of innocence was not clear-cut. It was not DNA evidence conclusively ruling him out as the perpetrator, for instance. We said Escamilla failed on two fronts: he made an insufficient showing of actual innocence, and he did not establish that his petition was timely under § 2244(d).

Like Escamilla, Araujo has made an insufficient showing to raise the inference that he is actually innocent. He relies on postconviction testimony of Mendoza and Zaida Cintron; on his claim that Bishops gang members testified falsely; on what he calls the exculpatory eyewitness account of Officer John Delgado; and on false gun evidence. We will review this evidence briefly.

As we noted, both Mendoza and Araujo were charged in the murder of Rodriguez. It was the State's theory that Araujo did the shooting. Mendoza's guilty plea was based on his admission that he was the "cover man" for Araujo. Now, Mendoza claims he was the shooter. At the time he testified at Araujo's postconviction hearing, he had only 3 or 4 years left to serve on his sentence for his participation in the murder, a fact which causes one to view his testimony with some skepticism. Zaida Cintron, who was an Ambrose gang member and Mendoza's girlfriend, testified at Araujo's trial that she was walking up the street and saw Araujo driving a maroon-colored car. She asked him for a ride, but he told her that he couldn't give her one because he needed to hide his gun because he "had done something." She said Araujo was alone in the car. At the postconviction hearing, Cintron testified that her trial testimony was false. She said she testified falsely to protect her boyfriend, Mendoza.

The state trial judge, who listened to these witnesses, found them incredible. He rejected Mendoza's testimony

"not so much as for what he said, but for how he said it." He was also skeptical of Cintron's recantation, in part because she had been convicted of forgery, a conviction the judge found highly relevant on the issue of her credibility. The appeals court upheld these findings and the Illinois Supreme Court denied review. *People v. Araujo,* 184 Ill.2d 560, 239 Ill.Dec. 609, 714 N.E.2d 528 (1999). As a general matter, of course, findings made in the course of a state court proceeding are presumed correct. 28 U.S.C. § 2254(d)(2); § 2254(e)(1).

The claim that somehow Officer Delgado's eyewitness account must now show that Araujo is innocent needs little comment. Delgado testified for Araujo at his trial. He said on the day of the shooting he was off duty when he saw yet another person, Willie Perez, firing a gun between two parked cars. It is hard to see how that testimony can meaningfully be improved on. Furthermore, the claim that the Bishops gang members' testimony was false lacks support.

Finally, the ballistics evidence, tendered during the postconviction proceedings, showed that the .38 caliber pistol found in Araujo's home after the shooting was not the murder weapon. The bullet recovered from the victim was not fired from that weapon, a fact the prosecution conceded at the postconviction hearing. However, at trial the prosecution witness did not positively match the gun with the bullet and testified that the majority of weapons in the United States exhibited similar characteristics. The evidence Araujo offers falls short of showing that, in the face of the new ballistics evidence, the jury would have been unlikely to convict him. Even were actual innocence a freestanding exception to the time limits imposed by § 2244, Araujo would fail to show he should be allowed to proceed with his

petition and to pursue his underlying constitutional claims. However, and most importantly, as we have said, it is clear that in this circuit, actual innocence is not a freestanding exception to the statute. For that reason, Araujo's petition is barred by the one-year statute of limitations. Accordingly, the judgment of the district court is AFFIRMED.

Appendix B

United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: December 16, 2005

BEFORE: Honorable WILLIAM J. BAUER, Circuit Judge
Honorable DANIEL A. MANION, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

No. 05-1174

ROLANDO ARAUJO, JR.,
Petitioner - Appellant

v.

NEDRA CHANDLER, Warden,
Respondent - Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 04 C 374, Blanche M. Manning, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1061-110393)

Appendix C

United States District Court
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA, *ex rel.* ROLANDO ARAUJO, JR.

v.

JERRY STERNES, Respondent.[1]

No. 04 C 374.

November 4, 2004.

MEMORANDUM AND ORDER

MANNING, District Judge

Petitioner Rolando Araujo's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is before the court. The respondent seeks to dismiss the petition as time-barred. For the following reasons, the respondent's motion to dismiss is

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[1] Araujo's petition named Jerry Sternes, the warden of the Dixon Correctional Center, as the respondent. The respondent's reply substitutes the warden of the Lawrence Correctional Center as the respondent without any explanation. The inmate search function on the Illinois Department of Corrections website indicates that Araujo is still incarcerated at the Dixon Correctional Center. *See* http://www.idoc.state.il.us/subsections/search/default.asp. Accordingly, Sternes is the appropriate respondent. *See* Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts. If Araujo has moved, the parties should so advise the court.

granted.

I. Background

The court will presume that the state court's factual determinations are correct for the purposes of habeas review as Araujo has not provided clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1); *Todd v. Schomig,* 283 F.3d 842, 846 (7th Cir.2002). The court thus adopts the state court's recitation of the facts, and will briefly summarize the key facts which are relevant to Araujo's § 2254 petition.

In 1988, Mario Rodriguez was shot in connection with a gang-related fight. Araujo was subsequently charged with first degree murder. At trial, the only physical evidence presented by the State was a .38 caliber revolver the police seized from Araujo's home within a few hours of the murder. The State argued that Araujo had used the revolver to shoot Rodriguez and fled the scene and hid the gun in his house, and that police officers found the gun before Araujo could get rid of it. In support, the State presented, among other things, a weapons expert who testified that the revolver could have been the murder weapon because it had the same class characteristics as the bullets recovered from the victim's body and two eyewitnesses who testified that the revolver was the same gun used to shoot the victim. On cross-examination, the weapons expert testified that there were "millions" of guns with the same class characteristics.

A jury convicted Araujo of first degree murder and the court sentenced him to a term of fifty years. Araujo appealed and the Illinois Appellate Court affirmed his conviction and sentence on March 31, 1994. Araujo did not file a petition for leave to appeal ("PLA") with the Illinois Supreme Court.

On October 21, 1996, Araujo filed a state post-conviction petition and the trial court subsequently held an evidentiary hearing. Robert Mendoza (Araujo's co-defendant) testified that he shot the victim. In addition, Zaida Cintron, Mendoza's girlfriend, testified that she saw Araujo on the day of the shooting and that she falsely had told the police that Araujo told her he had "just done something" and had to hide his gun in order to protect Mendoza. The parties also stipulated that: (1) Araujo's expert in ballistics would testify to a reasonable degree of scientific certainty that the bullets recovered from the victim's body were not fired from the gun recovered from Araujo's home; and (2) a forensic science expert employed by the Illinois State Police would testify that one of the bullets could not have been fired from Araujo's gun and that the other bullet was too badly damaged to make a comparison.

The trial court stated that Mendoza and Cintron's testimony was incredible. It then found that the trial testimony that Araujo's gun "may or may not have been the weapon" was "mistaken" because the gun "could not have been the weapon." It thus noted that its task was to decide whether the result at trial would have been different if the jury had not heard the testimony potentially tying Araujo's gun to the murder and the State's arguments about that testimony. It then reviewed the remaining testimony against Araujo, including his statement (made when he was arrested for another charge before his murder trial) that, "This ain't [expletive deleted]. I'm out on bond for murder from when I killed Buffy [the victim] with the .38."

In light of the entire record, the trial court concluded that the new evidence about the weapon was not so conclusive that if it been heard, the result of the trial would have been

different. Accordingly, it denied Araujo's petition. The Illinois Appellate Court affirmed the trial court. It also observed that Araujo could have discovered the new weapons evidence earlier with the exercise of due diligence because the gun was available for inspection prior to trial yet he only elected to retain an expert to examine it in the post-conviction proceedings. Araujo filed a PLA raising the new evidence issue which was denied on June 2, 1999.

On June 6, 2000, Araujo filed a second state post-conviction petition alleging that: (1) his trial counsel's assistance was ineffective because counsel should have obtained an independent forensic analysis of the gun prior to trial; (2) new evidence shows that the State's weapons expert destroyed exculpatory evidence by filing down the markings on the bullets; (3) the State's forensic expert committed deliberate perjury; and (4) the State violated his right to due process by failing to disclose that the gun recovered from his home was not the murder weapon. In support, Araujo submitted an affidavit stating that he told his lawyer prior to trial that he was innocent and that the gun seized from his home had no connection to the murder.

On June 15, 2000, the trial court denied the petition as improperly successive and barred by res judicata, explaining that Araujo had failed to demonstrate that his prior post-conviction proceedings were deficient or that he lacked a complete opportunity to litigate his "it could not have been my gun" argument during his first post-conviction petition proceedings.

The Illinois Appellate Court affirmed this decision on September 27, 2002. It agreed that the claims were barred by res judicata, but also alternatively held that they failed on the merits. Araujo filed a PLA, which was denied on February 5,

2003. Araujo then filed a petition seeking relief under § 254 with this court on January 20, 2004. In his petition, he asserts that: (1) the State knowingly presented false evidence at trial; and (2) trial counsel was constitutionally ineffective because he failed to challenge the State's false evidence.

II. Discussion

The respondent contends that Araujo's petition is time-barred under 28 U.S.C. § 2244(d). Araujo, on the other hand, contends that his petition is timely or, alternatively, that there is an actual innocence exception to the statute of limitations. For the following reasons, the court disagrees with Araujo on both points.

A. Statute of Limitations

The statute of limitations begins to run when the latest of several events occur, including the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review or the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2254(d)(1). "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending," however, tolls the statute of limitations. 28 U.S.C. § 2244(d)(2).

Here, as noted above, the Illinois Appellate Court affirmed Araujo's conviction and sentence on March 31, 1994. His PLA or a notice of intent to file one was due twenty-one days later, or on April 21, 1994. *See* Ill. S.Ct. Rule 315(b). The one-year statute of limitations for habeas corpus cases did not become effective until April 24, 1996,

so a petitioner whose conviction became final before this date is entitled to a one-year grace period ending on April 23, 1997. *See Gendron v. Ahitow*, 154 F.3d 672, 675 (7th Cir.1998); *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir.1996), *rev'd on other grounds*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). The respondent thus asserts that Araujo was entitled to a one-year grace period to file his § 2254 petition, unless the statute of limitations was tolled.

Araujo, on the other hand, contends that the statute of limitations actually began to run on March 29, 1997, when he definitively found out that his gun could not have been the murder weapon. When the Illinois Appellate Court affirmed the denial of Araujo's first post-conviction petition, however, it held that he could have readily discovered the information about the gun before trial because the gun was available for inspection then but Araujo elected not to engage a ballistics expert until he filed his post-conviction petition. The court must accept the state court's finding that Araujo could have learned about the gun issue much sooner than he did because Araujo has not provided clear and convincing evidence to the contrary and, in any event, the court agrees with the state court. *See* 28 U.S.C. § 2254(e)(1). Araujo is, therefore, not entitled to begin the clock in March of 1997, as he could have discovered the factual predicate of his claim earlier with the exercise of due diligence.

The limitations clock thus began to tick on April 23, 1997, when the one-year grace period ended. The clock then stopped 180 days later, when Araujo filed a timely state post-conviction petition on October 21, 1996. The clock then started ticking again on June 2, 1999, when the Illinois Supreme Court denied his PLA. *See Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir.2000). Araujo had 185 days left to file his § 2254 petition (early December of 1999), but did not

do so until January of 2004.[2] His petition is, therefore, time-barred.

B. Actual Innocence

Araujo argues that actual innocence is an exception to dismissal on the basis of the statute of limitations. The Seventh Circuit, however, has very recently rejected this precise argument, stating that actual innocence is only "relevant to a claim that the habeas statute of limitations should be equitably tolled" if the petitioner can "show some action or inaction on the part of the respondent that prevented him from discovering the relevant facts in a timely fashion, or, at the very least, that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations." *Gildon v. Bowen*, No. 03-2076, --- F.3d ---, 384 F.3d 883, 2004 WL 2187583 (7th Cir. Sep 30, 2004). As discussed above, Araujo has not made such a showing.

Araujo nevertheless argues that *Gildon* is distinguishable because the holding in *Gildon* is limited to petitioners who seek to equitably toll the statute of limitations. According to Araujo, this means that *Gildon* is inapplicable because he is trying to obtain relief from the statute of limitations due to a fundamental miscarriage of justice.

In support, Araujo correctly notes that equitable tolling necessarily requires a petitioner to show that he could not have discovered the facts forming the basis of his claim within the limitations period. On the other hand, the fundamental miscarriage of justice rule requires a petitioner

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[2] The court notes that Araujo's second state post-conviction proceeding began on June 6, 2000, and thus could not toll an already-expired limitations period.

to establish actual innocence and it is irrelevant whether he could or should have discovered the facts supporting his actual innocence claim earlier. Fundamentally, however, regardless of how Araujo characterizes his argument, his petition is time-barred.

There are two ways to characterize Araujo's petition. First, the essence of his petition is that the normal statute of limitations should not be used because to do so would be unfair. This is, in essence, an equitable tolling argument and as such, it cannot survive *Gildon*. Second, Araujo contends that actual innocence claims in § 2254 petitions are not subject to the statute of limitations. The court disagrees, at least in the context of this case.

Actual innocence is a gateway to avoid procedural default, not a free-standing claim. *See Herrera v. Collins*, 506 U.S. 390, 401, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) ("Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence"); *U.S. ex rel. Davila v. Chandler*, No. 04 C 4112, 2004 WL 2381872 at *6 (N.D. Ill. Oct 15, 2004) ("Actual innocence is a gateway which allows a habeas petitioner to obtain review of otherwise procedurally barred claims, as opposed to a Monopoly-style 'get out of jail free' card"). Procedural default occurs when a petitioner fails to comply with state procedural rules. *Mahaffey v. Schomig*, 294 F.3d 907, 915 (7th Cir.2002). Because Araujo is trying to avoid the federal one-year statute of limitations for habeas petitions, as opposed to seeking to avoid a default in state court, the actual innocence exception is inapplicable.

In addition, the statute of limitations applies to Araujo's actual innocence claim because this claim, at its heart,

reflects his dissatisfaction with the state court's ruling regarding the gun evidence. As noted above, the trial court held that the new evidence about the weapon was not so conclusive that if it been heard, the result of the trial would have been different. It thus denied his first state post-conviction petition. Araujo disagrees with this ruling and characterizes his attack on it in federal court as an actual innocence claim. In support, he contends that but for the admission of the gun evidence, no reasonable juror would have convicted him. *See Schlup v. Delo,* 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

The state courts, however, considered and rejected this claim. His "actual innocence" argument is thus fundamentally no different from the claim of any other habeas petitioner who feels that the state court got it wrong when it held that the record adequately supported a defendant's conviction despite the improper admission of certain contested evidence. If the court accepted Araujo's argument, it would, therefore, essentially be holding that the statute of limitations in § 2244(d) is irrelevant when a petitioner attempts to challenge his conviction in a federal habeas petition. The court declines to accept Araujo's invitation to jettison the statute of limitations in such a situation. Accordingly, the court finds that Araujo's petition is time-barred despite his invocation of the actual innocence exception to procedural default.

III. Conclusion

For the above reasons, Araujo's § 2254 petition [1-1] is denied.

Appendix D

SUPREME COURT OF ILLINOIS

February 5, 2003

NO. 95089 - People of the State of Illinois, respondent v. Rolando Araujo, Jr., petitioner, Leave to appeal, Appellate Court, First District

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 27, 2003.

Appendix E

State Of Illinois Court Of Appeals, First District

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,

v.

ROLANDO ARAUJO, JR., Defendant-Appellant.

No. 88 CR 13872

September 27, 2002

Before BUCKLEY, QUINN, and REID

Order

Defendant Rolando Araujo, Jr., appeals the denial of his successive postconviction petition. On appeal, defendant argues that the trial court erred in denying his successive postconviction petition because he presented evidence obtained subsequent to his first postconviction petition. We affirm.

1. Background

As this is defendant's third appeal before this court, we shall only discuss the facts relevant to this appeal.

Following a jury trial, defendant was convicted of the first degree murder of Mario Rodriguez, a rival gang member, and sentenced to 50 years' imprisonment. We affirmed defendant's conviction and sentence on direct appeal. *People v. Araujo*, 261 Ill. App. 3d 393 (1994).

During his trial, the State's ballistics expert, Sergeant Vincent Lomoro, testified that one of the two bullets taken from the victim's body was unsuitable for microscopic examination and he was "unable to find sufficient matching individual characteristics" on the second bullet to positively determine that it was fired from the .38-caliber gun recovered from defendant's home. He did find that the bullets were fired from a gun with five lands and grooves to the right that was consistent with the gun in evidence. Lomoro testified, "I cannot positively say the bullet was fired in this gun, but I cannot eliminate the gun either." On cross-examination, Lomoro admitted that there were "millions" of guns with this same classification.

In August 1996, defendant petitioned the trial court for an order upon the State to release the gun taken from his home for an independent inspection by a forensic scientist. In September 1996, the trial court ruled that it would not order the State to release the evidence unless defendant filed a postconviction petition and could demonstrate other grounds with which to question the jury's verdict. In October 1996, defendant filed his first petition for postconviction relief based on the claim of new evidence demonstrating his innocence. The petition was supported by affidavits of Robert Mendoza, defendants's confessed accomplice, and Zaida Cintron, Mendoza's former girlfriend who had testified against defendant at trial. In February 1997, the trial court ordered the State to release the gun for testing.

In March 1997, Dr. Kenneth A. Siegesmund, a forensic scientist hired by defendant, compared the bullets from the victim's body with bullets test-fired from the gun. Dr. Siegesmund's opinion was that the body bullets were not fired from the gun. He based his opinion upon the "width of the 'lands' and the differences in scratch density." Dr.

Siegesmund also was of the opinion that the body bullets had been filed down in some manner that destroyed the "land" markings. In June 1997, the State's forensic scientist, Walter J. Kryszak, examined the gun and body bullets. He also was of the opinion that the body bullets could not have been fired from the gun. However, he did not believe the bullets are "filed down," but were damaged from the "impact with a hard object."

In July 1997, the trial court conducted an evidentiary hearing on defendant's postconviction petition. At the hearing, the parties stipulated that the forensic scientists would testify that the gun recovered from defendant's home was not the murder weapon. The court heard additional evidence in favor of defendant's petition for postconviction relief. Following the hearing, the court denied defendant's postconviction petition, and we affirmed this decision on appeal. *People v. Araujo*, No. 1-97-3762 (December 11, 1998) (unpublished order under Supreme Court Rule 23).

In June 2000, defendant filed a successive petition for post-conviction relief based on forensic evidence obtained subsequent to the filing of his original petition. In this petition, defendant alleged that (1) he was denied his Sixth Amendment right to the effective assistance of counsel where his trial counsel did not obtain an independent forensic analysis of the gun alleged as the murder weapon; (2) new evidence shows that Sergeant Lomoro destroyed exculpatory evidence by filing down the marking on the body bullets; (3) new evidence shows that the State's forensic expert committed deliberate perjury; and (4) the State violated defendant's right to due process by failing to disclose that the gun recovered from his home was not the murder weapon. In support of his petition, defendant submitted his sworn affidavit that prior to trial he told his attorney that he was

innocent and that the gun seized from his home had no connection to the murder.

In September 2000, the trial court denied the successive postconviction without an evidentiary hearing. In its written order, the court held:

> "the petitioner had failed to demonstrate any basis to warrant the trial court's consideration of the instant postconviction petition. In no way does petitioner establish that the proceedings during his earlier petition were deficient in some fundamental way. The trial court properly dismissed petitioner's original petition and the appellate court affirmed the trial court's dismissal. Moreover, petitioner had a complete opportunity to present the claims now alleged on appeal of the trial court's dismissal of his postconviction petition. Accordingly, the claims now alleged in the instant petition are barred by the doctrine of *res judicata* and waiver."

This appeal follows.

II. Analysis

On appeal, defendant argues that the trial court erred in dismissing, without an evidentiary hearing, his successive postconviction petition which alleged violations of substantial constitutional rights and was supported by factual affidavits.

The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 through 8 (West 2000)) provides a remedy to criminal defendants who claim that substantial violations of their constitutional rights occurred in their trial. *People v. Edmonds*, 143 Ill. 2d 501, 510 (1991). A postconviction

proceeding is not an appeal *per se*, but a collateral attack upon a final judgment. *Edmonds*, 143 Ill. 2d at 510. The purpose of a postconviction proceeding is not to determine guilt or innocence, but to inquire into constitutional issues that have not been, and could not have been, previously adjudicated. *Edmonds*, 143 Ill. 2d at 510. In a postconviction proceeding, the petitioner bears the burden of proving that a substantial constitutional violation occurred at trial. *Edmonds*, 143 Ill. 2d at 510.

The Act contemplates the filing of only one postconviction petition, although successive petitions may be allowed where the proceedings on the initial petition were deficient in some fundamental way. *People v. Erickson*, 183 Ill. 2d 213, 222-23 (1998). Under the Act, "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2000). Furthermore, a ruling on a postconviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition. *Erickson* 183, Ill. 2d at 223. A trial court's dismissal of a postconviction petition is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-89 (1998).

The trial court held that the claims presented in defendant's successive postconviction petition "are barred by the doctrine of *res judicata* and waiver." We agree. While defendant filed his original postconviction petition prior to receiving the results of the forensic analysis on the gun, the record shows that Dr. Siegesmund submitted his report in March 1997, which was several months before the trial court's July 1997 evidentiary hearing on defendant's petition. Additionally, defendant stipulated to the results of the forensic tests as evidence at the July 1997 hearing. Clearly, defendant had this "new" evidence during his original postconviction proceedings, and these claims could have

been raised at that time. Defendant had ample time to either amend his petition or to raise these claims during his evidentiary hearing. As such, the trial court properly denied defendant's successive petition for postconviction relief.

Even if these claims were not barred, the arguments would fail. First, defendant contends that his trial counsel was deficient in failing to order forensic analysis of the gun. In *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S, Ct, 2052 (1984), the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the Sixth Amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687.

If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697. In evaluating sufficient prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

In this case, defendant did not show that there is a reasonable probability that the failure of his trial attorney to order forensic testing on the gun would have altered the result. Sergeant Lomoro stated that he was not positive that the gun was the murder weapon, and on cross examination, he admitted that there were "millions" of guns that possessed the same characteristics. In his closing, defendant's attorney reminded the jury that Sergeant Lomoro could not match the bullets to the gun. Defendant has failed to show how a

forensic analysis on the gun would have produced a different result.

Additionally, at the evidentiary hearing on defendant's original postconviction petition, the trial court found that this new evidence was not so conclusive that, had it been heard, it would have changed the outcome of the trial. This court affirmed that decision in *Araujo*, 1-97-3762 (unpublished order under Supreme Court Rule 23).

Next, defendant contends that new evidence shows that Sergeant Lomoro destroyed exculpatory evidence by filing down the body bullets. This argument is without merit. Defendant relies solely on the statement by Dr. Siegesmund that "the apparent filing down *** by the crime lab was contrary to forensic principles and may have destroyed exclusionary physical evidence ***. Nothing else in the record supports this argument and defendant offers no proof that Sergeant Lomoro filed down the markings on the body bullets.

Next, defendant asserts that Sergeant Lomoro perjured himself because he "knew that the body bullets did not match the *Araujo* gun." This argument is contrary to the record. Sergeant Lomoro never testified conclusively at trial that the bullets matched that gun. He testified that he could not rule it out, but he was not positive that it was the murder weapon. Defendant has merely shown that the forensic testing did, in fact, conclusively rule out the gun as the murder, weapon, but this evidence does not show that false testimony was given at trial. Defendant's argument fails.

Finally, defendant maintains that the prosecution violated its obligations under *Brady v. Maryland*, 373 U.S. 83, 10 1. Ed. 2d 215, 83 S. Ct. 1194 (1963), by failing to disclose that the gun recovered from his home was not the murder weapon. Again, nothing in the record supports this contention. Defendant has failed to show that the

prosecution was aware of this fact. In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

Defendant bases this claim on Dr. Siegesmund's opinion that the body bullets appeared to have been filed down, and that therefore, an agent of the State was aware that the body bullets did not match the gun. Again, nothing in the record indicates that the bullets were filed down nor does the record show that the prosecution knew, at the time of the trial, that the gun was not the murder weapon. Defendant has failed to show differently.

III. Conclusion

For the foregoing reasons, we affirm the decision of the trial court. Additionally, we grant the State's request for costs and mandate a fee of $100.00 for defending this appeal.

Appendix F

Circuit Court of Cook County, Illinois, Criminal Division

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Respondent,

v.

ROLANDO ARAUJO, JR., Defendant-Petitioner.

No. 88 CR 13872

September 15, 2000

Honorable Thomas R. Sumner

ORDER

Petitioner, Rolando Araujo, Jr., pursuant to the provisions of the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.* (West 2000, seeks to vacate the judgment of conviction entered against him in the above entitled cause. As grounds for relief petitioner submits his second, successive petition and contends he received ineffective assistance of both trial and appellate counsel.

I. Background

Following a jury trial, petitioner was found guilty of first degree murder and sentenced to a term of 50 years' imprisonment. A direct appeal was taken to the Illinois Appellate Court. First Judicial District wherein petitioner alleged: 1) his .38-caliber revolver was improperly admitted into evidence on the basis that there was insufficient proof to connect the weapon to petitioner and the crime; 2) the trial

court erred in allowing the State to recall Officer Delgado in order to reopen cross-examination and in refusing to allow petitioner to rehabilitate him; and 3) he was not proven guilty of first degree murder beyond a reasonable doubt. On March 31, 1994, the appellate court affirmed the judgment of conviction of the circuit court of Cook County. *People v. Araujo*, 261 Ill. App. 3d 393, 633 N.E.2d 844 Dist. 1994). Petitioner next filed a petition for post-conviction relief. On July 23,1997, the trial court dismissed the petition after holding an evidentiary hearing. Petitioner appealed the trial court's dismissal and contended: 1) the trial court erroneously denied his post-conviction petition because it evaluated the newly discovered evidence under the wrong standard; 2) the newly discovered evidence would probably change the result on retrial; and 3) the testimony of certain State's witnesses was perjured On December 11, 1998, the appellate court affirmed the judgment of the circuit court of Cook County.

II. Analysis

At the outset, the trial court must determine whether petitioner's present petition is properly here for consideration under the provisions of the Post-Conviction Hearing Act (hereinafter, the "Act"). 725 ILCS 5/122-1 *et seq.* (West 2000). As previously mentioned, petitioner's original post-conviction petition was dismissed on July 23, 1997. Thus, the petition presently before this court constitutes a second, successive petition. *People v. Free*, 122 Ill. 2d 367, 375-76, 522 N.E.2d 1184, 1188 (1989); *People v. Le May*, 44 Ill. 2d 58, 60, 254 N.E.2d 476, 477 (1969) (submission of post-conviction petition after dismissal of earlier petition requires evaluation of latter as a successive petition rather than as an amendment).

The Act contemplates the filing of only one post-conviction petition. *People v. Flores*, 153 Ill. 2d 264, 273,

606 N.E.2d 1078, 1083 (1992). Indeed, the Act provides that any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived. 725 ILCS 5/122-3 (West 2000). Moreover, a ruling on a post-conviction petition has a *res judicata* effect with respect to all claims that were raised or could have been raised in the original or amended petition. *Free*, 122 Ill. 2d at 375-76, 522 N.E.2d at 1188.

Successive petitions are permitted where the proceedings on the initial petition were deficient in some fundamental way or where the claimed error is one which could not have been presented in an earlier proceeding. *Flores*, 153 Ill. 2d at 273-75, 606 N.E.2d 1073, 1083. However, where the petitioner has had one complete opportunity to show a substantial denial of his constitutional rights, the second petition may be properly dismissed. *People v. Erickson*, 183 Ill. 2d 213, 700 N.E:2d 1027 (1998). The exception to the rule proscribing multiple post-conviction petitions is a narrow one. *People v. Heirens*, 271 Ill. App. 3d 392, 403, 648 N.E.2d 260, 268 (1st Dist. 1995). The filing of successive post-conviction petitions implicates two competing interests:

> On one hand, there is the State's interest in providing a forum for the vindication of the petitioner's constitutional rights. On the other hand, the State has a legitimate interest in the finality of criminal litigation and judgments.

Flores, 153 Ill. 2d at 274, 606 N.E.2d at 1083. Indeed, without finality, the criminal law is deprived of much of its deterrent effect. *Teague v. Lane*, 489 U.S. 288, 309, 103 L. Ed. 2d 334, 355, 109 S. Ct. 1060, 1074 (1989). The successive filing of petitions undermines that finality *Flores*, 153 Ill. 2d at 274, 606 N.E.2d at 1083.

In the instant matter, petitioner has failed to demonstrate any basis to warrant the trial court's consideration of the instant post-conviction petition. In no way does petitioner establish that the proceedings during his earlier petition were deficient in some fundamental way. The trial court properly dismissed petitioner's original petition and the appellate court affirmed the trial court's dismissal. Moreover, petitioner had a complete opportunity to present the claims now alleged on appeal of the trial court's dismissal of his post-conviction petition. Accordingly, the claims now alleged in the instant petition are barred by the doctrine of *res judicata* and waiver.

III. CONCLUSION

Based upon the foregoing discussion, the trial court finds that the matters raised by petitioner are barred. Accordingly, the instant petition for post-conviction relief shall be and is hereby denied.

Appendix G

State Of Illinois Court Of Appeals, First District

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,

v.

ROLANDO ARAUJO, Defendant-Appellant.

No. 88 CR 13872

December 11, 1998

Before BUCKLEY, QUINN, and ZWICK

ORDER

Defendant Rolando Araujo appeals from the denial of postconviction relief following an evidentiary hearing. Defendant contends on appeal that the trial court erroneously denied his post-conviction petition because it evaluated the newly discovered evidence under the wrong standard, the newly discovered evidence would probably change the result on retrial, and the testimony of prosecution witnesses was perjured.

Following a jury trial, defendant was convicted of the first degree murder of Mario Rodriguez, a rival gang member, and sentenced to 50 years in prison. Robert Mendoza, who was co-indicted for the crime, pleaded guilty after defendant's trial and received a 25-year prison sentence. We affirmed defendant's conviction and sentence on direct appeal. *People v. Araujo*, 261 Ill. App. 3d 393 (1994).

At trial, three eyewitnesses, who had been friends of the victim, identified defendant as the man who shot the victim with a .38 caliber gun. Minutes after the shooting, as two of the witnesses were running to notify the victim's mother, they saw two police officers responding to a report of the shooting, told them what had happened, and described the car defendant had been driving. Defendant was arrested at his home later that night. The officers obtained a search warrant and recovered a .38 caliber gun from a bedroom in defendant's home. Mendoza was identified as a second shooter, who shot at the eyewitnesses with a "small, dark automatic." Regalberto Figueroa testified that he did not know defendant by name, but he identified him in a lineup the night of the shooting and also at trial. He testified that defendant was armed with a long, "black .38." Gabriel Mujica, who had known defendant for about two years, also identified defendant in a lineup and at trial as the man who shot the victim. Ismael Martinez identified defendant at trial. Figueroa and Mujica identified the gun recovered from defendant's home as the gun they saw in his hand when he shot the victim.

The State's ballistics expert, Vincent Lomoro, testified at trial that one of the two bullets taken from the victim's body was unsuitable for microscopic examination. Lomoro was "unable to find sufficient matching individual characteristics" on the second bullet to positively determine that it was fired from the .38 caliber gun found in defendant's home. But he did find that the bullet was fired from a gun with five lands and grooves to the right, which was consistent with the gun in evidence. Lomoro testified, "I cannot positively say the bullet was fired in this gun but I cannot eliminate the gun either." On cross examination, Lomoro admitted that there were "millions" of weapons with this same classification. The State argued in closing that it was the murder weapon. Defense counsel argued that all the expert said was

"generically speaking, it's a .38" but could not and did not say that the bullet suitable for comparison was fired from that gun.

Defendant, represented by counsel, subsequently filed a petition for post-conviction relief, presenting a claim of actual innocence based on newly discovered evidence. He attached the affidavits of codefendant Robert Mendoza and Zaida Cintron, Mendoza's girlfriend at the time of the crime. Mendoza did not testify at defendant's trial. Cintron testified that shortly after the shooting, of which she was unaware, she saw defendant driving about six blocks from the scene of the shooting. She asked him for a ride, but defendant said "no, that he had to go home to put a .38 away, that he had done something."

Mendoza stated in his affidavit that he and Cintron had been attacked by rival gang members earlier on the day of the murder. Mendoza went home, got a .38 caliber revolver and along with "Herbie," who had a .25 caliber automatic, went to " revenge" on the rival gang. Defendant drove by, and Mendoza asked him for a ride to Cintron's house. Defendant was not told of the earlier incident with the rival gang; nor was he aware that Mendoza and Herbie were armed. After seeing rival gang members standing on Wood Street near 18th Street, Mendoza jumped out of the car at a stop sign. Herbie followed, and the two men shot at the rival gang members. Mendoza saw the victim lying between two parked cars and "shot down at him" until his gun was empty. Mendoza and Herbie ran back to defendant's car, and defendant drove them to 16th Street and Newberry, as they directed. Mendoza traded his gun to another gang three days later, and Herbie gave his gun to another gang member.

Zaida Cintron stated in her affidavit that when she testified at defendant's trial she was 14 years old and "hung out" with the street gang to which Mendoza belonged. She

said that when the police questioned her after the shooting, they said that Mendoza and defendant had confessed. The police said they knew she was in the car with them, and she and Mendoza were both going to jail for murder. She told them that she did not know anything about the murder, but she had seen defendant that afternoon near Throop and 18th Streets. She stated she had not told the police that she asked defendant for a ride or that he told her he had "just done something" and had to go hide his gun. Later, she was told she was required to testify about what was in her statement, although the statement "was not the truth about what I had observed nor what I had told the police." She stated she did as she was told and testified in accordance with the statement.

The trial court held an evidentiary hearing. When Mendoza began to testify, the State told the court that Mendoza had pleaded guilty to this murder and had stipulated that he was the "cover man" who stood on the corner and provided "cover" for defendant, who shot the victim. When the State suggested that Mendoza's testimony might expose him to further liability, defense counsel stated he did not believe there was any basis to prosecute Mendoza. The court appointed an attorney to advise Mendoza. The attorney told the court that a perjury charge was a legal impossibility because there was no sworn testimony at a prior proceeding. Additionally, because Mendoza did not stipulate to exact facts at his guilty plea proceeding, his testimony at the hearing would not provide a basis for the State to vacate the plea.

Mendoza testified at the evidentiary hearing that after rival gang members threw bottles and bricks at him and Cintron, he left Cintron there and went home to get a .38 caliber gun from his bedroom. He put two different kinds of bullets in it and went outside where he saw Herbie Zuniga.

When defendant drove by, Zuniga asked defendant to give them a ride to Mendoza's girlfriend's house. Mendoza directed defendant to drive through the rival gang's neighborhood, which he did. Mendoza and Herbie jumped out of the car at a stop sign when they saw rival gang members. They shot at the rival gang members, and Mendoza shot "the whole round" at the victim who was lying between two cars. They "jumped in" defendant's car and told him to drive to 17th Street and Newberry. Subsequently, Mendoza, defendant, and Willie Perez were arrested. Perez did not have anything to do with the crime. Mendoza could not recall "exactly" what statements he made to the police when he was arrested.

On cross-examination, the State impeached Mendoza with his signed court-reported statement in which he stated the following. After the rival gang members had attacked him and Cintron on August 23, 1988, he went to Willie Perez's house. Defendant was there, and Mendoza told them he had just "got jumped." Defendant and Perez were members of the same street gang as Mendoza. Mendoza took a walk and "got a .25 automatic gun." Perez and defendant had a .38 caliber gun, which they loaded and placed between the front seats of defendant's car. Defendant was driving, Willie was in the front passenger seat, and Mendoza was in the backseat, armed with his .25 caliber gun, when a brick hit the car at Wood and 18th Streets. Mendoza recognized some rival gang members, in particular "Buffy" (the victim). Mendoza jumped out and fired four shots. He heard six shots fired from a ".38." Mendoza, Perez and defendant ran back to the car, and defendant drove. Mendoza testified at the hearing that he was "not sure" or did not recall making those statements.

Zaida Cintron testified at the evidentiary hearing that after the assault, she went home. Later, she went out to find

Mendoza and saw defendant talking to somebody who was standing near his car. Three days later, she and Mendoza were taken to the police station for questioning. When the police told her that Mendoza had confessed and that they knew she had been in the car, she stated that Mendoza had "nothing to do with it," but she had seen defendant the day of the murder and he had refused to give her a ride because he had to "go put a gun away." She testified that was not true, but she was scared and needed to find a way to protect herself and Mendoza. At trial, she testified in accordance with her statement because she thought she would go to jail for something she did not do.

On cross-examination, Cintron testified that when the police told her that both Mendoza and defendant had confessed, she implicated defendant because Mendoza was her boyfriend at the time. She remembered testifying before the grand jury and also at defendant's trial without being subpoenaed. She did not tell anyone that her prior statements and testimony regarding defendant were false before being contacted by his present attorney. Cintron admitted that she was currently on probation on a 1996 conviction of forgery.

The parties stipulated that Kenneth Siegesmund, defendant's expert in ballistics, would testify to a reasonable degree of scientific certainty that the bullets recovered from the body of the victim were not fired from the .38 caliber revolver recovered from defendant's home. Also, Walter Kryszak, a forensic science expert employed by the Illinois State Police, would testify that one of the bullets could not have been fired from the revolver, and the other bullet was too badly damaged to make a comparison.

The trial court initially commented, "I think we can agree that the standard is that this evidence has to be so conclusive as to result in a change in a [sic] outcome of the trial. Do we have that?" The court stated that it "did not

believe" Mendoza's testimony at the hearing, found him "unreliable" and concluded that he was being "very elusive" and "loose and flippant" when confronted with his prior statement. The court stated, "I didn't believe him, pure and simple." The court also found Cintron incredible based on her "highly relevant" prior conviction for fraud. The court characterized as "mistaken" the trial testimony that the weapon recovered from defendant's home was possibly the murder weapon. Accordingly, the court stated it must determine whether the result at trial would have been different if the jury had not heard that testimony and the State's argument regarding it. The court stated that previously the testimony was this "may or may not have been the weapon" and now "could not have been the weapon." The court concluded that without the weapon, there remained against defendant the testimony of three eyewitnesses who were rival gang members and that the new information was not so conclusive that had it been heard the result at trial would have been different.

Defendant contends that the trial court erred in denying his post-conviction petition.

A defendant's post-conviction petition may be based on a claim of newly discovered evidence establishing his actual innocence of the crime for which he was convicted. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). For defendant to prevail, the evidence must be new, material, noncumulative, and so conclusive as to probably change the result on retrial. *Washington*, 171 Ill. 2d at 489. "Requests for a new trial based on newly discovered evidence of actual innocence are to be viewed with great caution and are not lightly granted. The trial court's determination is a discretionary one that will be overturned only upon a clear abuse of discretion." *Washington*, 171 Ill. 2d at 497 (McMorrow, J., specially concurring). Similarly, on review of the trial court's decision

denying post-conviction relief following an evidentiary hearing, we determine if the decision was manifestly erroneous. *People v. Franklin*, 167 Ill. 2d 1, 9 (1995); see also *People v. Coleman*, No. 81441, slip op. at 15 (Ill. October 1, 1998) (manifestly erroneous standard appropriate only at conclusion of evidentiary stage).

Initially, we are unpersuaded by defendant's argument that the post-conviction court applied the wrong standard in evaluating the newly discovered evidence. Although the court omitted the word "probably" from its characterization of the standard used to evaluate such evidence, it was clearly aware of the correct standard. Defense counsel cited *People v. Washington*, 171 Ill. 2d 475 (1996) and repeatedly referred to the standard to evaluate newly discovered evidence. For instance, counsel stated at one point, "Your Honor, the standard again is would the new evidence probably change the result on retrial, and I suggest that it would." Also, although different judges presided at trial and at the post-conviction proceeding, the record does not support defendant's argument that the post-conviction court was "wholly unfamiliar" with the evidence offered at trial.

In this case, the post-conviction court did not base its determination on defendant's petition and the affidavits of Mendoza and Cintron. Rather, it held a full evidentiary hearing and only then clearly found that these witnesses lacked credibility. See *People v. Hernandez*, 298 Ill. App. 3d 36, 41 (1998). Based on those findings, we find no reason to disturb the court's determination that defendant should not be granted a new trial on the basis of their new testimony. Mendoza's testimony at the evidentiary hearing that he and Herbie were the shooters contradicted the trial testimony of defendant's witness that Mendoza and Willie Perez were the shooters. Furthermore, the trial record shows that when defendant was arrested on another charge before trial, he

stated, "This ain't shit. I'm out on bond for murder from when I killed Buffy [the victim] with the .38."

The new evidence regarding the .38 caliber gun recovered from defendant's home established that one of the bullets recovered from the victim's body could not have been fired from that gun. The State conceded below that the gun should have been excluded as the murder weapon, since only one .38 caliber gun was used in the shooting. Initially, defendant provides no reason why he could not have presented this testimony through a ballistics expert at trial. The gun was available for his inspection before trial, and he did retain an expert to inspect it for the post-conviction proceeding. Therefore, defendant failed to show that this was new evidence which could not have been discovered previously with due diligence. Also, the trial evidence established only that one of the bullets was consistent with being fired from the gun recovered from defendant's home, but the expert could not definitively say that it had been. In closing arguments, different inferences were drawn by the State and defense counsel from this testimony. The State argued it was the murder weapon while defense counsel argued that this claim could not and had not been established. The stipulated testimony at the evidentiary hearing, based upon additional ballistic evidence, showed that the bullet suitable for comparison had not been fired from that gun. Therefore, the evidence established that the .38 caliber gun found at defendant's home was not the murder weapon. The jury did not hear that definitive evidence. However, we cannot say that the new evidence was so conclusive in this case that if the jury had heard it, the result at trial probably would have been different. Here, eyewitnesses identified defendant immediately after the shooting as the offender. The jury also heard testimony that when defendant and another man were arrested on another charge defendant

minimized the importance of that arrest, referring to being out on bond for the murder he committed "with the .38."

Although Figueroa and Mujica identified the gun recovered from defendant's home as the gun they saw in his hand when he shot the victim, we draw no inference that they committed perjury, as defendant contends. As testimony at trial established, there were "millions" of .38 caliber guns in circulation, which had similar characteristics. Based on the court's determination that Mendoza and Cintron were not credible at the evidentiary hearing, and the inconclusive testimony of the State's expert at trial, defendant failed to show by clear and convincing proof that the State's witnesses committed perjury at trial. We find no clear abuse of the court's discretion in its decision not to grant defendant a new trial based on this record.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Appendix H

Circuit Court of Cook County, Illinois, Criminal Division

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Respondent,

v.

ROLANDO ARAUJO, JR., Defendant-Petitioner.

No. 88 CR 13872

RULING ON POST-CONVICTION PETITION

Reporter's Official Transcript of Proceedings

July 23, 1997

Before Honorable Thomas R. Sumner

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THE COURT: Well, I think we can agree that the standard is that this evidence has to be so conclusive as to result in a change in a outcome of the trial. Do we have that?

Well, first of all, let's take the testimony of Mr. Mendoza. Notwithstanding counsel's arguments, I don't find Mendoza's testimony today here to be credible; not so much as for what he said, but for how he said it. Basically what we have is a person who said he didn't remember most of what he apparently said to a state's attorney when a statement was

taken from him and recorded by a court reporter. Well, that in and of itself is not so bad because it was ten years ago, but it's not so much that he says, it's how he says it. And as I sit here, I can tell you that I did not believe what he said. He can certainly remember things that he wanted to remember; that is the impression that I got. But the things he did not want to remember, he gave me the impression that he is was being very elusive and basically just being loose and flippant with the person who was confronting him with the statement that was apparently taken from him several years ago.

So the first thing is that notwithstanding what he said, I have to believe that what he's saying today is the truth. I didn't believe him, pure and simple. So in essence no matter what he testified to, if he testified as far as this trier of fact is concerned, by observing that witness, I don't find him to be a reliable one.

Now, we also have Ms. Cintron, and I want to compare Ms. Cintron to Mr. Mendoza. I didn't believe Mr. Mendoza because I didn't -- I don't think that he was being a candid witness here today. I didn't disbelieve him because he had another conviction. I believe it was a drug offense if I'm not mistaken if I'm correct. So you indicated that there was a certified copy to indicate, that to indicate that he -- I don't find that at all to impeach his credibility. He did that on his own by the way he testified today.

Ms. Cintron, on the other hand, has a conviction for fraud which I find to be much more relevant, highly relevant, on the question of whether or not she should be believed. She's already testified that what she said at some point in the past was not true, and that what she's is saying now is true. So there is your clashing, are you telling -- are you lying now, or were you lying then, which one am I suppose to believe. And the proof of whether or not she is a person to be believed lies in her past, and her past indicates that she's

been convicted of fraud before. That's enough for me. What we have right now are two people who for one reason or another don't convince this Court that they should be believed here today.

Now, as far as the weapon is concerned, I agree that based on what the -- that's where this all started from by the way. That's where this all started from was the bullets, and I thought that Mr. Goodman had enough to convince this Court that a hearing was warranted. Well, as it turns out, we did find out something; we found out that the weapon when compared to the bullets -- that the testimony rather of the sergeant back then in '91 was in error, and that the weapon that he was talking about should have been excluded, is that right?

MR. CLARK: (Nodding head.).

MS. OPP: Yes, your Honor.

THE COURT: That's right. That's what we found out that he made a mistake. So then the rest revolves around the question of whether or not the jury based on that testimony -- or rather based on that testimony, his testimony, and the argument of the state's attorney, had they not heard that argument, and had they heard the truth about the weapon, whether the result would have been different. Well, the fact of the matter is even if he had said what turned out to be the facts today, I don't believe that the jury would necessarily have found anything differently.

Because what we have is the testimony that this may or may not have been the weapon, okay, and in fact could not have been the weapon. That's fine. So we don't have the weapon, but we have three eyewitnesses who happen to be the rival gang members of the defendant. We have Mr. Mendoza who is a member of the same gang, who if he

testified back then, who knows what the jury would have believed? And we have Ms. Cintron.

I don't think that based on everything that we have here today that this new information, whatever you want to call it, is so conclusive that the result, had it been heard, would have been different. At least that's my conclusion.

Then the petitioner's motion for an order granting Post-Conviction relief will be denied.

MS. OPP: Judge, thank you for the time we took this afternoon.

THE COURT: Thank both sides for a well put together and well argued petition.

Appendix I

State Of Illinois Court Of Appeals, First District

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,

v.

ROLANDO ARAUJO, Defendant-Appellant.

No. 1-91-2081.

March 31, 1994
Rehearing Denied May 9, 1994

BUCKLEY, J., CAMPBELL, P.J., and MANNING, J.

Following a jury trial, defendant Rolando Araujo was found guilty of first-degree murder and was sentenced to a term of 50 years in the Illinois Department of Corrections. Defendant appeals his conviction. We affirm.

At defendant's trial, Regalberto Figueroa, Gabriel Mujica and Ismael Martinez testified on behalf of the State. Their testimonies are corroborative and the following is a summation of them.

On August 23, 1988, at about 6:15 p.m., Figueroa, Martinez, David Chacon and Mujica, all admittedly members of the Bishop street gang, met Mario Rodriguez upon leaving Harris Park. After conversing, Figueroa, Mujica and Martinez began walking north on the east side of the street, while Chacon and Rodriguez walked across to the west side of the street.

Defendant, a member of the Ambrose street gang, drove past them heading north towards 18th and Wood Streets, stopped his maroon-colored car, jumped out and shot at Rodriguez. Rodriguez fell between two parked cars, defendant ran over to him and fired several shots down into his body. Then, defendant ran back down the street, got into his car and drove away. Meanwhile, Robert Mendoza, also an Ambrose street gang member, was standing on the east side of the street shooting in the direction of Figueroa, Mujica, and Martinez.

Zaida Cintron, an Ambrose gang member and Mendoza's girl friend at the time of the shooting incident, also testified on behalf of the State. She testified that at about 6:30 p.m., on August 23, 1988, she was walking at 18th and Throop Streets, about six blocks from the scene of the murder, noticed defendant driving a maroon-colored car and asked him for a ride. Defendant told Cintron that he could not oblige her because he needed to hide his .38 caliber gun since he "had done something." At the time, defendant was alone in the car.

Officer Spratte testified for the State that on August 23, 1988, he and Detective McGreal heard a radio transmission at about 6:40 p.m. which instructed them to proceed to 8059 South Oketo in an effort to apprehend defendant who was identified as a gunman in a shooting. Since Spratte is an expert on Chicago street gangs, specializing in knowledge of Pilsen area gangs, he knew that defendant lived at the above address. They arrived at the address at about 7:10 p.m. and saw a maroon Toyota Cressida in the driveway. They watched the house until defendant came out of it at about 7:30 p.m., at which time they arrested him. Later that evening, Spratte obtained a search warrant for 8059 South Oketo. Upon execution, a dark Smith and Wesson .38

caliber revolver was retrieved. Detective McGreal's testimony corroborates the above.

The State's firearm expert examined the bullets recovered from decedent's body and analyzed whether they came from the revolver obtained from defendant's residence. The expert testified that the bullets recovered from decedent's body were consistent with having been fired from that gun. The State rested its case in chief.

Officer Delgado of the Chicago police department testified on behalf of defendant. Delgado stated that on August 23, 1988, while off duty, he was driving west on 18th Street when he witnessed Willie Perez firing a gun from 18th and Wood Streets. He saw Perez walk down the street and fire several more shots between two parked cars. He noticed a red Toyota double parked at 18th and Wood Streets.

Terry Cornell, a private investigator for defendant, testified that he had interviewed Mujica, who allegedly told him that he was not at the scene when decedent was shot. Cornell further testified that he interviewed Figueroa in jail. Figueroa allegedly told Cornell that he did not see who shot decedent. Mujica and Figueroa denied ever making those statements and confirmed that they were never afforded the opportunity to review Cornell's notes or sign them. Defendant rested.

Then, the State moved to re-open the cross-examination of Delgado. The circuit court allowed the State to do so. When Delgado took the witness stand again, he admitted that he had been a member of the Ambrose street gang 30 years previously. On re-direct, defendant asked Delgado several questions in an attempt to rehabilitate him. The circuit court sustained two of the State's objections on the basis that the

questions regarding Delgado enlisting in the United States Marine Corps and what his employment was at age 20 were beyond the scope of the State's cross-examination.

Thereafter, the State and defendant presented their closing arguments and the circuit court gave the jury instructions. After deliberating, the jury found defendant guilty of first-degree murder. Now, defendant appeals his conviction, arguing that he was not proven guilty of first-degree murder beyond a reasonable doubt and that the circuit court improperly admitted the .38 caliber revolver and allowed the State to re-open its cross-examination of Delgado.

First, we address defendant's argument that the .38 caliber revolver was improperly admitted into evidence on the basis that there was insufficient proof to connect the weapon to defendant and the crime. A gun "is relevant if there is evidence to connect it with the defendant and with the crime." (*People v. Gonzales* (1968), 40 Ill.2d 233, 240, 239 N.E.2d 783, 789, quoting *People v. Jones* (1961), 22 Ill.2d 592, 599, 177 N.E.2d 112, 116.) Proof of the connection between the gun and the defendant and the crime may be circumstantial. *People v. Hoffstetter* (1990), 203 Ill.App.3d 755, 148 Ill.Dec. 651, 560 N.E.2d 1349.

In the case at bar, there was testimony and evidence that (1) defendant shot decedent with a .38 caliber gun, (2) defendant stated that he had to hide his .38 because he "had done something", (3) the gun was found in his residence, and (4) the bullets found in decedent's body were consistent with having been shot from the gun found in defendant's home. "Where there is evidence that the defendant used a particular type of weapon and a similar weapon is found, the jury may reasonably infer that it was the one used to commit the

offense." *People v. Fierer* (1988), 124 Ill.2d 176, 194, 124 Ill.Dec. 855, 862, 529 N.E.2d 972, 979, quoting *People v. Tribbett* (1968), 41 Ill.2d 267, 242 N.E.2d 249.

In the instant case, there is ample evidence to connect defendant to the gun and the gun to the crime. Accordingly, we hold that the gun was relevant evidence and therefore, properly admitted.

Defendant's next argument on appeal is that the circuit court erred in allowing the State to recall Officer Delgado in order to re-open cross-examination and in refusing to allow defendant to rehabilitate him. It is within the circuit court's discretion to allow a witness to be recalled. (*People v. Ishmael* (1984), 126 Ill.App.3d 320, 81 Ill.Dec. 532, 466 N.E.2d 1334.) The circuit court's decision to allow a witness to be recalled for further cross-examination should not be disturbed on review absent an abuse of that discretion. *Ishmael,* 126 Ill.App.3d 320, 81 Ill.Dec. 532, 466 N.E.2d 1334.

The re-opening of cross-examination was not an abuse of discretion. The State asked only one question. That question related to the witness' credibility and bias; his past membership in the same gang of which defendant is also a member. Defendant was then allowed ample time and opportunity to rehabilitate the witness. In fact, defendant asked Delgado more than 15 questions in an attempt to rehabilitate the witness' credibility. The circuit court properly disallowed re-direct on issues outside the scope of the State's cross-examination. The scope of redirect examination is also within the discretion of the circuit court, and should not be reversed unless there "is a clear abuse of discretion resulting in manifest prejudice to defendant." (*People v. Washington* (1984), 127 Ill.App.3d 365, 82

Ill.Dec. 505, 468 N.E.2d 1285.) After reviewing the record, we find no clear abuse of the circuit court's discretion on this issue.

Defendant's last argument on appeal is that he was not proven guilty of first-degree murder beyond a reasonable doubt. When presented with the issue of sufficiency of the evidence, it is not a reviewing court's function to retry the defendant. (*People v. Collins* (1985), 106 Ill.2d 237, 87 Ill.Dec. 910, 478 N.E.2d 267.) Rather, after viewing the evidence in a light most favorable to the State, a reviewing court must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Collins*, 106 Ill.2d at 261, 87 Ill.Dec. at 920, 478 N.E.2d at 277, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.) We must be mindful that the trier of fact is in the best position to judge the credibility of the witnesses, determine the weight to be given their testimony and the reasonable inferences to be drawn therefrom. *People v. Furby* (1990), 138 Ill.2d 434, 150 Ill.Dec. 534, 563 N.E.2d 421.

Three witnesses testified that they saw defendant shoot decedent and deliberately walk over to him and shoot his remaining bullets into decedent. Additionally, the three witnesses, not only identified defendant, but accurately described his car; while a fourth witness testified that she spoke with him just minutes after the shooting, a few blocks away from the scene as he drove past her in that same car. Defendant told that witness that he needed to go home and hide a .38 caliber gun because he had just "done something." An hour and one-half after the shooting, police arrested defendant outside his home which had a car similar to that described by the above four witnesses parked in the driveway. Six hours after defendant's arrest, police executed

a warrant on defendant's house and found a .38 caliber gun. An expert later found that the bullets recovered from decedent's body were consistent with being fired from that gun.

After viewing the evidence in a light most favorable to the State, we find that a rational trier of fact could have found all the elements of murder in the first degree. We, therefore, affirm defendant's conviction.

For the foregoing reasons, the conviction of the circuit court of Cook County is affirmed.

AFFIRMED.

Appendix J

STATUTORY PROVISION INVOLVED

Title 28. Judiciary and Judicial Procedure

Part VI, Chapter 153. Habeas Corpus

§2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that,

but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court,

shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is

pending shall not be counted toward any period of limitation under this subsection.

Appendix K

STATUTORY PROVISION INVOLVED

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under

the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

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No. 05-1183

In the Supreme Court of the United States

ROLANDO ARAUJO, PETITIONER,

v.

NEDRA CHANDLER, WARDEN, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether applicability of an "actual innocence" exception to an untimely federal habeas petition warrants this Court's review, given the Seventh Circuit's factbound determination, which provided an alternative ground supporting the judgment below, that petitioner failed to make an adequate showing of "actual innocence."

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BRIEF IN OPPOSITION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one-year statute of limitations for filing a federal habeas corpus petition. See 28 U.S.C. § 2244(d)(1). The limitations period begins to run from the latest of four possible dates, see 28 U.S.C. § 2244(d)(1)(A-D), and is tolled during the pendency of a properly filed post-conviction petition, see 28 U.S.C. § 2244(d)(2). Because petitioner's conviction became final prior to April 24, 1996, the effective date of AEDPA, he was required to file his federal habeas petition on or before April 24, 1997. Even with the tolling effect of petitioner's state post-conviction litigation, his petition was untimely.

In the Court of Appeals, petitioner did not dispute that his petition was untimely. Instead, he maintained that he was "actually innocent," and that "actual innocence" is a freestanding exception to § 2244(d)(1) under the "fundamental miscarriage of justice" doctrine. See *Schlup v. Delo*, 513 U.S. 298 (1995). The Court of Appeals disagreed, holding that there was no freestanding "actual innocence" exception to the statute of limitations. As an independent ground supporting its judgment, the Court of Appeals also determined that, in any event, petitioner did not, and could not, demonstrate that he was "actually innocent" of the underlying offense.

Given the court's alternative holding, this case presents an exceptionally poor vehicle to resolve any conflict among the circuits regarding whether there is an "actual innocence" exception to § 2244(d). For this reason, certiorari should be denied.

STATEMENT

A. The facts underlying the crime of conviction, as set forth by the state appellate court (Pet. App. 46a-49a) are as follows.

On August 23, 1988, Regalberto Figueroa, Gabriel Mujica, Ismael Martinez, and David Chacon, all members of the Bishops street gang, met the victim, Mario Rodriguez, upon leaving Harris Park in Chicago. After conversing, Figueroa, Mujica and Martinez began walking north on the east side of the street, while Chacon and Rodriguez walked across to the west side of the street.

Petitioner, a member of the Ambrose street gang, drove past them, heading north towards 18th and Wood Streets. He stopped his maroon-colored car, jumped out, and shot at Rodriguez. As Rodriguez fell between two parked cars, petitioner ran over and fired several more shots into Rodriguez's body. Petitioner then ran back down the street, got into the same car, and drove away. At the same time, Robert Mendoza, another Ambrose gang member, stood on the east side of the street and shot his pistol in the direction of Figueroa, Mujica, and Martinez. These three individuals all identified petitioner, in court, as the gunman who shot Rodriguez.

Zaida Cintron, an Ambrose gang member and Mendoza's girlfriend at the time of the shooting, testified that at about 6:30 p.m., on August 23, 1988, she was walking at 18th and Throop Streets in Chicago, about six blocks from the scene of the murder. She noticed petitioner driving a maroon-colored car and asked him for a ride. Petitioner told Cintron that he could not oblige her because he need to hide his .38 caliber gun since he "had done something." At the time, petitioner was alone in the car. Also, when petitioner was arrested on an unrelated offense, he stated, "This ain't shit. I'm out on bond for murder from when I killed Buffy [victim Rodriguez] with the .38."

Officer Spratte testified that, on August 23, 1988, he and Detective McGreal heard a radio transmission at about 6:40 p.m. instructing them to proceed to 8059 South Oketo to apprehend petitioner, identified as a gunman in a shooting. Spratte, an expert on Chicago street gangs, and Pilsen

neighborhood gangs in particular, knew that petitioner lived at the above address. The officers arrived at the address at about 7:10 p.m. and saw a maroon Toyota Cressida in the driveway. When petitioner exited the house at about 7:30 p.m., the officers arrested him. Later that evening, Spratte obtained a search warrant for the house. A search led to the retrieval of a dark Smith and Wesson .38 caliber revolver.

The State's firearm expert examined the bullets recovered from the victim's body to determine whether they came from the revolver obtained from petitioner's residence. The expert testified that the bullets recovered from the victim's body were consistent with having been fired from that gun.

To summarize: the State's primary evidence of guilt consisted of three eyewitnesses who identified petitioner as the gunman, and the vehicle he used to leave the scene. Petitioner also gave two incriminating statements: the first immediately after the shooting, and the second upon his arrest for a separate offense. After advancing this evidence, the prosecution rested its case in chief.

For his defense, petitioner presented two primary witnesses. Officer Delgado of the Chicago police department testified that, on August 23, 1988, while off duty, he was driving west on 18th Street when he witnessed Willie Perez firing a gun from 18th and Wood Streets. He saw Perez walk down the street and fire several more shots between two parked cars. He noticed a red Toyota double parked at 18th and Wood Streets.

Terry Cornell, a private investigator for petitioner, testified that he had interviewed Mujica, who allegedly told him that he was not at the scene when the victim was shot. Similarly, Cornell said that he interviewed Figueroa, who allegedly told Cornell that he did not see who shot the victim. Mujica and Figueroa, however, denied ever making those statements to

Cornell, and confirmed that they were not given the opportunity to review Cornell's notes or sign them. Petitioner rested.

The prosecution moved to re-open the cross-examination of Delgado, and the trial court granted the motion. When Delgado took the witness stand again, he admitted that he had been a member of the Ambrose street gang 30 years previously. The jury retired to deliberate, and found defendant guilty of first-degree murder.

B. On March 31, 1994, the Illinois Appellate Court affirmed petitioner's conviction, and denied rehearing on May 9, 1994. Pet. App. 46a-52a. Petitioner did not file a petition for leave to appeal to the Illinois Supreme Court.

C. On October 21, 1996, petitioner filed a post-conviction petition under 725 ILCS 5/122-1, *et seq.* (West 1996), arguing that he was actually innocent. The trial court held an evidentiary hearing, at which Zaida Cintron and Robert Mendoza testified. Cintron recanted her trial testimony, claiming that she only implicated petitioner to protect Mendoza, her boyfriend. Mendoza testified that he, alone, was the shooter, and that petitioner was not involved.

The trial court found that both witnesses were incredible, and ultimately denied relief. Pet. App. 42a-45a. With respect to Mendoza, the trial court observed, "I don't find Mendoza's testimony today here to be credible; not so much as for what he said, but for how he said it . . . as I sit here, I can tell you that I did not believe what he said . . . I don't think that he was being a candid witness here today." *Id.* at 42a-43a.

With respect to Cintron, the trial court noted that she "has a conviction for fraud which I find to be much more relevant, highly relevant, on the question of whether or not she should be believed . . . And the proof of whether or not she is a person to be believed lies in her past, and her past indicates that she's

been convicted of fraud before. That's enough for me. What we have right now are two people who for one reason or another don't convince this Court that they should be believed here today." Pet. App. 43a.

On December 11, 1998, the Illinois Appellate Court affirmed. *Id.* at 32a-41a. In particular, the court found that the trial court "clearly found that these witnesses [Mendoza and Cintron] lacked credibility," and that there was "no reason to disturb the court's determination that defendant should not be granted a new trial on the basis of [Mendoza and Cintron's] new testimony." *Id.* at 39a. On June 2, 1999, the Illinois Supreme Court denied petitioner's petition for leave to appeal.

D. On June 6, 2000, petitioner filed a successive state petition for post-conviction relief, arguing that his due process rights were violated when the prosecution introduced false evidence (a weapon and false testimony related to that weapon), and that his trial attorney was ineffective for failing to ask for ballistics testing on the prosecution's firearms evidence. The state trial court denied relief, finding that the claims raised by petitioner were waived and barred by the doctrine of res judicata. *Id.* at 28a-31a. On September 27, 2002, the appellate court affirmed. *Id.* at 20a-27a. The Illinois Supreme Court denied petitioner's petition for leave to appeal on February 5, 2003. *Id.* at 19a.

E. On January 20, 2004, petitioner filed a federal habeas petition, arguing that the prosecution knowingly relied on false firearms evidence and that his attorney was ineffective for failing to investigate that evidence before trial. Respondent moved to dismiss the petition because petitioner filed it outside of the one-year grace period available to petitioners whose convictions became final prior to enactment of AEDPA on April 24, 1996. See *Lindh v. Murphy*, 96 F.3d 856, 865-866 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997).

Petitioner responded that the time-bar did not apply because he was "actually innocent" of the underlying offense.

F. The district court disagreed with petitioner's argument, finding that petitioner's "actual innocence" claim was logically construed as an equitable tolling argument, and was, therefore, precluded by *Gildon v. Bowen*, 384 F.3d 883 (7th Cir. 2004). Pet. App. 10a-18a. The district court also rejected petitioner's attempt to graft a freestanding "actual innocence" exception onto the text of the statute. Pet. App. at 16a-17a. Thus, the district court dismissed the habeas petition as untimely. *Araujo v. Sternes,* 2004 WL 2496467 (N.D. Ill., Nov. 4, 2004).

G. Petitioner appealed, and the Court of Appeals affirmed, holding that "actual innocence" is not a freestanding exception to AEDPA's statute of limitations, and that if petitioner's argument were reviewed within the text of the statute, the facts underlying the claim were not timely under 28 U.S.C. § 2244(d)(1)(D) because they were available to petitioner as early as 1994. *Araujo v. Chandler*, 435 F.3d 678 (7th Cir. 2005) (Pet. App. 3a-6a).

In the alternative, following a detailed review of the evidence presented by petitioner to support his theory of "actual innocence," the Court of Appeals concluded that petitioner "made an insufficient showing that he is actually innocent." *Id.* at 6a. In particular, that court deferred to the factual finding made by the post-conviction trial court that recanting witnesses Mendoza and Cintron were "incredible." *Id.* at 7a. The Court of Appeals also rejected petitioner's continued reliance on Officer Delgado, questioning how his trial testimony—that he saw another person, Willie Perez, do the shooting—could be "meaningfully improved on." *Id.* The court additionally found that petitioner's reliance on additional post-trial statements from Bishops gang members was lacking in support. *Id.* And the Court of Appeals held that there was no misplaced reliance on the ballistics evidence at trial where the prosecution witness

never matched the recovered bullet with that weapon. *Id.* The court concluded that, even if "actual innocence" were a freestanding exception to AEDPA's limitations period, petitioner's evidence was insufficient to show that "the jury would have been unlikely to convict him." *Id.*

REASONS FOR DENYING THE PETITION

The petition is not worthy of certiorari. Even if petitioner were correct to maintains that there is a conflict among the circuits regarding the viability of an "actual innocence" exception to AEDPA's statute of limitations, this case would be an exceptionally poor vehicle to resolve that conflict. The reason is that the Seventh Circuit's judgment rests on the independent and alternative ground that, even assuming there were an "actual innocence" exception, petitioner utterly failed to meet that standard. The state courts already rejected much of petitioner's proposed exculpatory evidence, and on federal habeas review, those factual and credibility determinations receive great deference under 28 U.S.C. §§ 2254(d)(2) and (e)(1). And the trial evidence of petitioner's guilt was overwhelming: three eyewitnesses identified petitioner as the gunman, and petitioner made two incriminating statements following the crime. Thus, whether "actual innocence" is a freestanding exception to the limitations period, is an equitable tolling mechanism, is confined to one of the starting points specified in 28 U.S.C. § 2244(d)(1)(A-D), or is none of the above, this Court could not reverse the judgment below unless it also granted review of the Seventh Circuit's factbound ruling that petitioner failed to satisfy the requirements of any conceivable "actual innocence" exception.

Petitioner's primary argument for certiorari is that there is a circuit split with respect to the availability of an "actual innocence" gateway to excuse an otherwise untimely habeas petition. Pet. 16-24.

The present case does not present the proper vehicle for resolving the alleged circuit split because petitioner cannot, under any circumstances, show that he is "actually innocent." That is, the choice of standards would have no effect on the ultimate outcome of petitioner's "actual innocence" claim. See Robert L. Stern, et al., *Supreme Court Practice*, § 4.4 at 231 (8th ed. 2002) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied."); *id.* § 6.37(a), at 457 (case presents a poor vehicle for reaching the question presented where "the facts are so one-sided that the case would be decided in favor of the respondent no matter how the conflict is resolved").

Here, the ultimate outcome of petitioner's "actual innocence" argument would be the same, no matter what standard this Court were to endorse. The Seventh Circuit's determination that petitioner was not "actually innocent" of the underlying offense aptly proves this point. Significantly, in rejecting the petitioner's arguments for "actual innocence," the Court of Appeals declined to reassess the factual and credibility findings made by the state courts. This was a proper exercise of restraint. It is beyond dispute that a federal court adjudicating a habeas petition must presume that findings of fact made in state court are correct, see 28 U.S.C. § 2254(e)(1), and must refrain from re-weighing the credibility of state court witnesses. See *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (federal courts cannot re-determine credibility of witnesses whose demeanor has been observed by the state court). And, in the present case, that same evidence, would fare no better before this Court than it did before the Seventh Circuit.

The Seventh Circuit's discussion of petitioner's evidence of "actual innocence" is divided into four parts. Petitioner first argued that the recantations offered by Robert Mendoza and Zaida Cintron undermined the prosecution's case. Mendoza

testified at the post-conviction evidentiary hearing that petitioner did not shoot at the victim, but only transported Mendoza and Herbie Zuniga to the scene of the shooting. According to Mendoza, petitioner was unaware of the motive for the shooting and, other than providing transportation, was uninvolved in the entire affair. Likewise, Cintron recanted her original trial testimony assigning guilt to petitioner, explaining that she implicated him in the shooting only to protect herself and Mendoza from criminal charges. Pet. App. 34a-37a.

The post-conviction trial judge viewed the testimony of these witnesses in a hearing and thoroughly disbelieved them: Mendoza's demeanor suggested that he was lying, and Cintron's criminal history included a conviction of fraud. The court thereafter denied post-conviction relief, *id.* at 42a-45a, and that decision was affirmed on appeal, *id.* at 32a-41a.

These credibility assessments, as findings of fact, are presumed to be correct absent clear and convincing evidence from petitioner. See § 2254(e)(1). On habeas review, petitioner presented no evidence to rebut the credibility findings made by the state post-conviction trial judge. Under the governing standard, the Court of Appeals was bound by these factual findings, and exercised the proper restraint in declining to disturb them. Pet. App. 7a.

Petitioner further argued that the three Bishops gang members who identified him at trial—Regalberto Figueroa, Gabriel Mujica, Ismael Martinez, and David Chacon—actually lied about their identifications. In support of this contention, petitioner only offered several affidavits that consisted of hearsay; accordingly, the Court of Appeals accurately noted that this particular argument "lacked support." *Id.* This conclusion was sound, as hearsay evidence is "particularly suspect" when viewed within the context of an actual innocence argument. *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

Petitioner aiso emphasized that, following additional post-trial ballistics testing, the .38 pistol found in petitioner's home and introduced into evidence at trial did not match the bullet recovered from the victim. According to petitioner, this discrepancy proved that he was innocent. The Seventh Circuit disagreed with petitioner's assessment of this proof, observing that, at trial, the prosecution's ballistics expert did *not* positively match the gun with the recovered bullet. Pet. App. at 7a. In fact, the expert testified that the majority of weapons in the United States exhibited the same characteristics as the weapon introduced at trial. *Id.* Here, again, the Seventh Circuit's resolution properly deferred to the factual finding, made by the state courts, that petitioner overestimated and misconstrued the potency of the new ballistics evidence. *Id.* at 7a, 40a.

Lastly, petitioner maintained that Officer Delgado's post-trial testimony—that Delgado did not see petitioner at the shooting—sufficed as evidence of "actual innocence," and that a post-trial hearsay affidavit enhanced his account. Once again, the Court of Appeals properly deferred to the findings of fact made in the course of petitioner's trial and collateral litigation, doubting how Delgado's exculpatory testimony, the credibility of which was already evaluated and rejected by petitioner's jury, could "meaningfully be improved on." *Id.* at 7a.

In sum, the evidence of petitioner's guilt is so overwhelming, and his proposed exculpatory evidence so feeble, that the Seventh Circuit's resolution of the case would stand no matter what standard this Court were to endorse. Under these circumstances, certiorari should be denied.

Finally, petitioner attempts to manufacture a circuit split regarding the Seventh Circuit's application of *Schlup*, arguing that certiorari is necessary to "provide further guidance to the lower courts in the context of applying the fundamental miscarriage of justice exception to section 2244(d)." Pet. 25-

26. In particular, petitioner argues that the Court of Appeals misapplied *Schlup* to the facts of his case, and that it improperly narrowed the *Schlup* standard to require a showing of "irrefutable evidence" of innocence. Pet. 25-26.

Neither argument warrants this Court's review. Petitioner's disagreement with the Court of Appeals' application of *Schlup* to his case, see Pet. 25-26, is an insufficient basis upon which to grant certiorari, as that argument only takes issue with the application of a legal rule to a particular set of facts. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule"). See also Stern, *supra*, § 4.17 at 255 ("The Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles.").

Nor did the Court of Appeals apply a standard more restrictive than *Schlup*. Under *Schlup*, a petitioner must produce "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. With that evidence, the petitioner must show that no juror would have convicted him in light of the new evidence. *Id.* at 327. Petitioner claims that the Court of Appeals imposed a stricter standard, and cites to language that variously describes petitioner's inability to provide "irrefutable," "clear-cut," or "conclusive" evidence showing that he is innocent. Pet. 26.

Such language merely characterized the view of petitioner's evidence; it did not jettison the applicable standard. Indeed, the Seventh applied the correct standard, holding that "[t]he evidence Araujo offers falls short of showing that . . . the jury would have been unlikely to convict him." Pet. App. 7a. This is the same standard articulated by the Sixth Circuit in *Souter*

v. Jones, 395 F.3d 577 (6th Cir. 2005), which found that the petitioner *did* meet his burden under *Schlup*. See *Souter*, 395 F.3d at 602 ("when an other wise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found [petitioner] guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims"). And it is, naturally, the same standard articulated in *Schlup*.

Thus, the Court of Appeals' articulation—and application—of *Schlup* did not constitute a radical departure from settled law, and therefore does not fall within the class of cases that, as noted by the petitioner in *House v. Bell*, No. 04-8990, cert. granted June 28, 2005, have interpreted *Schlup* "in radically different ways." Pet. 26. Under these circumstances, certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 05-1183

In the
Supreme Court of the United States

ROLANDO ARAUJO, JR.,

Petitioner,

v.

NEDRA CHANDLER, WARDEN

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Petitioner respectfully submits this reply in response to respondent's brief in opposition and in further support of his petition for a writ of certiorari in this case.

ARGUMENT

Respondent acknowledges that there is a three-way conflict among the courts of appeals regarding the proper application of the actual innocence exception of *Schlup v. Delo*, 513 U.S. 298 (1995), to the statute of limitations governing federal habeas corpus petitions, 28 U.S.C. § 2244(d). (Br.Opp. 7). In light of this conflict, the first question presented in this petition clearly warrants review by this Court. Indeed, respondent does not, and could not, contend that this issue is not worthy of review. Instead, respondent argues that review should not be granted in this particular case only because the court of appeals suggested a possible "alternative ground" to support its denial of relief to Araujo: namely, that Araujo failed to demonstrate his "actual innocence." (Br.Opp. 7).

Respondent can take no comfort in this alternative ground, however, because the court of appeals's assessment the evidence of Araujo's actual innocence is plainly contrary to this Court's recent decision in *House v. Bell*, 547 U.S. ___, 126 S.Ct. 2064 (2006 WL 1584475) (June 12, 2006) (finding that petitioner met the actual innocence standard of *Schlup*). Whereas the court of appeals in the decision below based its alternative holding on the fact that Araujo's evidence of actual innocence was not "clear-cut," "irrefutable," or "conclusive" (Pet.App. 6-8a), this Court's decision in *House* confirms that *Schlup* requires no such certainty. *House*, 126 S.Ct. at 2077 ("the *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence"); *id.* at 2086 ("This is not a case of conclusive exoneration."); *id.* at 2085 ("The evidence pointing to [another suspect] is by no means conclusive. [However,] the evidence pointing to [that

suspect] likely would reinforce other doubts as to [petitioner's] guilt.").

Moreover, Araujo's evidence is just as compelling as the evidence presented in *House*. In *House*, the defendant met the *Schlup* standard by undermining critical scientific evidence (which was used at trial to establish a motive and provide a "central theme in the State's narrative linking [him] to the crime") and by providing "troubling evidence" to suggest that another suspect "could have" committed the crime. *Id.* at 2079, 2083. Araujo has done nothing less. Araujo's evidence shows, and respondent admits, that Araujo's gun and the host of evidence connecting that gun to the murder – which was the State's central theme at trial – was unequivocally false evidence. The admitted falsity of the State's gun evidence is no less powerful evidence of innocence than was the DNA evidence in *House*. Likewise, Araujo's evidence shows that it was Mendoza, and not Araujo, who very likely shot and killed Rodriguez. As *House* demonstrates, a reasonable juror presented with this sort of evidence would have a reasonable doubt as to a defendant's guilt and, therefore, the *Schlup* standard would be met.

House also makes clear that the state post-conviction court's adverse credibility finding regarding Mendoza's in-court confession is not dispositive under *Schlup*. *Id.* at 2078 (holding that a lower court's assessment of individual items of evidence does not "tie [this Court's] hands"). As the Court reiterated in *House*, the *Schlup* standard generally "does not turn on discrete findings regarding disputed points of fact," but instead "requires a holistic judgment about 'all the evidence'" from the perspective of a reasonable juror. *Id.*

In Araujo's case, the state post-conviction court's finding that Mendoza's in-court confession was not credible simply

cannot be reconciled with the host of evidence that corroborates Mendoza's guilt – evidence that both the post-conviction trial judge and the court of appeals failed even to consider. This evidence includes Mendoza's repeated and consistent confessions on the night of the murder to Cintron, Mendoza's girlfriend, and to Serrano and Delgado, his two other friends. These confessions are corroborated by contemporaneous police reports and by other evidence, including Mendoza's clear motive for revenge, which a reasonable juror would consider to be especially strong evidence of Mendoza's guilt. As the Court noted in *House*, "[w]hen identity is in question, motive is key." *Id.* at 2079. No reasonable juror would ignore this powerful evidence of Mendoza's guilt and nevertheless find Araujo guilty beyond a reasonable doubt. In light of this evidence, respondent's reliance on the credibility finding in the state post-conviction court to sustain the court of appeals's assessment of Araujo's actual innocence claim (Br.Opp. 9) is misplaced.

Respondent's reliance on other evidence suggestive of Araujo's guilt also is unavailing. To pass through the *Schlup* gateway, a petitioner need not conclusively refute all of the evidence presented at trial. *Id.* at 2086. Further, the evidence that respondent relies on to support Araujo's conviction – the contradicted and thoroughly impeached eyewitness testimony of the Bishops gang members and the spurious inculpatory statement evidence (Br.Opp. 7) – is not only far from "overwhelming," as respondent claims, but is virtually impossible to credit when the evidence is considered as a whole.

CONCLUSION

There is no merit to respondent's assertion that Araujo cannot meet the *Schlup* standard of actual innocence and that

this case therefore does not merit review by this Court. This assertion is completely at odds with this Court's recent decision in *House*. Accordingly, the petition for writ of certiorari should be granted in this case to address the important issue of how the fundamental miscarriage of justice exception applies to section 2244(d).

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